



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 1381 OF 2016

STEPHEN KIPKEMBOI NG'ENO T/A

PACIFIC EDGE COMPANY LTD.....PLAINTIFF

VERSUS

TRANSNATIONAL BANK LIMITED.....1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT

FRANCIS NGOGOYO MUGO.....3RD DEFENDANT

EMILY WAMUCII NGOGOYO.....4TH DEFENDANT

RULING

What is before me for determination is the plaintiff's Notice of Motion dated 7th November, 2016 as amended on 21st March, 2017 seeking to restrain the defendants from selling, transferring or in any other way alienating the plaintiff's properties known as L.R No. Ngong/Ngong 43080 and L.R No. Ngong/Ngong 43081 (hereinafter referred to as "the suit properties").

The plaintiff's application is supported by the affidavit and supplementary affidavit sworn by the plaintiff on 7th November, 2016 and 9th December 2016 respectively. The plaintiff's case as set out in the said affidavits is as follows. The plaintiff charged the suit properties to the 1st defendant to secure a loan facility that was made available to him by the 1st defendant. The plaintiff's loan account fell into arrears. The plaintiff regularized his account and in October 2016, he wrote to the 1st defendant seeking to know his loan balance with a view of settling the same in full. The 1st defendant did not respond to the inquiry but instead, proceeded to sell the suit properties at an under value without a demand or notice to him as required by law. The plaintiff has contended that the postal address that was allegedly used by the 1st defendant to send to him a demand for payment and a statutory notice does not belong to him. The plaintiff has also denied service of the 45 days auctioneer's redemption notice. The plaintiff has contended further that the suit properties were jointly acquired with resources contributed by his wife and that the defendants' actions were unjust, unfair and occasioned him economic losses and suffering.

The application is opposed by the defendants. The 1st and 2nd defendants opposed the application through a replying affidavit sworn by Vincent Kipkoech Kiplagat on 2nd December, 2016. The 1st defendant has denied the plaintiff's claim that the suit properties were sold by the 1st defendant secretly without serving the plaintiff with the requisite notices. The 1st defendant has averred that the plaintiff fell into arrears in his loan repayment and a demand letter was sent to him on 8th January, 2016 that did not elicit any response. The 1st defendant has averred that the plaintiff was thereafter served with a 90 days statutory notice on 13th April, 2016 by way of registered post. The 1st defendant has contended that when the plaintiff failed to settle the loan amount after the said notice, the 2nd defendant was instructed to sell the suit properties by public auction and on 28th July, 2016, the 2nd defendant served the plaintiff with a 45 days redemption notice and notification of sale of the suit properties. The 1st defendant has averred that the plaintiff acknowledged receipt of the said redemption notice and notification of sale.

The 1st defendant has contended that the plaintiff through a letter dated 29th July, 2016 requested to be allowed to pay the loan amount that was in arrears through a postdated cheque of Kshs. 1,300,000/- payable on 3rd August, 2018 and to clear the loan balance within 21 days of the said date. The 1st defendant has averred that the 1st defendant acceded to the plaintiff's request but limited the 21 days the plaintiff had requested to clear the loan balance to 14 days.

The 1st defendant has averred that the plaintiff did not honour his word and as a result, it instructed the 2nd defendant to sell the suit properties by public auction. The suit properties were thereafter advertised in the Daily Nation Newspaper on 5th September, 2016 and 20th September, 2016 for sale by public auction on 21st September, 2016 which sale was successful. The 1st defendant has denied that the suit properties were

undervalued and has contended that the plaintiff has approached the court with unclean hands.

The 3rd and 4th defendants opposed the application through a replying affidavit sworn by the 3rd defendant on 26th December, 2016. The 3rd and 4th defendants' case is that they learnt of the public auction of the suit properties through the adverts that had been placed in the local newspapers. They have contended that on 21st September, 2016, they attended the auction, placed their bid and emerged as the highest bidders on the fall of the hammer. The 3rd and 4th defendants have averred that they purchased the suit properties at Kshs. 9,000,000/- of which they paid Kshs 2,250,000/- being 25% of the purchase price after the auction.

The 3rd and 4th defendants have averred that before they could settle the balance of the purchase price, the plaintiff sold the suit properties to a third party and instituted this suit. The 3rd and 4th defendants have averred that as at the time of filing of the instant suit, they had paid a total sum of Kshs 5,150,000/- being 57% of the purchase price. The 3rd and 4th defendants have contended that having expended a substantial amount of money in the acquisition of the suit properties, the orders sought if granted would be prejudicial to them while the plaintiff would suffer no prejudice if the orders are not granted.

The application was argued by way of written submissions. The plaintiff has argued in his submissions dated 7th July, 2017 that he has established a *prima facie* case with a likelihood of success. The plaintiff has submitted that the sale of the suit properties was unlawful for want of proper service of the statutory notice and notification of sale. The plaintiff has submitted that his right to redeem the suit properties could not be extinguished by an auction sale that was null and void. The plaintiff has submitted that the doctrine of estoppel raised by the 1st defendant could not arise as he did not draw the charge that he claimed to have contained an erroneous postal address. The plaintiff has submitted further that the defendants have not filed their defences to the plaintiff's claim despite having been served with the summons and as such, their responses and submissions to the application have no basis.

The 1st and 2nd defendants filed their submissions on 4th July, 2017 in which they have submitted that the plaintiff's application that was filed two months after the sale of the suit properties by public auction has been overtaken by events. The 1st and 2nd defendants have submitted that the plaintiff lost his right to redeem the suit properties at the fall of the hammer on 21st September, 2017. In support of this submission, the 1st and 2nd defendants relied on the case of Mbuthia vs. Jimba Credit Finance Corporation & another CA No. 111 of 1986 cited in Chrispo Okinda Mien vs. Kenya Commercial Bank HCCA No. 2 of 2014.

The 1st and 2nd defendants have submitted further that contrary to the plaintiff's allegation that the sale of the suit properties was conducted secretly, the plaintiff was served with a demand letter, statutory notice and the notification of sale which contained the particulars of the plaintiff's loan default and furthermore; the advertisements that were placed in the newspapers notified the public of the intended sale. The 1st and 2nd defendants have cited the case of Nurdin Bandali vs. Lombank Tanganyika Ltd(1963)EA 304, Combe vs. Combe(1951)1 ALL ER 1951 and the treatise, Phipson on Evidence, 17th Edn, and submitted that the plaintiff is estopped from denying the validity of the postal address number 328-00202, Nairobi which he had earlier on acknowledged as his true address when he executed the charge. The 1st and 2nd defendants have urged the court to find that the affidavit of service by Maina Mwangi annexed to the replying affidavit of Vincent Kipkoeh Kiplagat is sufficient proof of service of the notification of sale. The 1st and 2nd defendant have contended that the plaintiff did not adduce any evidence showing that he was not served with the said notice neither did he seek to cross examine the process server on this issue.

The 1st and 2nd defendants have submitted that a valuation that was done 6 months prior to the sale of the suit properties placed the forced sale value of the said properties at Kshs. 9 million which is the price at which the suit properties were sold at the public the auction. The 1st and 2nd defendants have submitted that the plaintiff has approached the court with unclean hands as his affidavit in support of the application is full of inconsistencies. The 1st and 2nd defendants have averred that the plaintiff had attempted to sell the suit properties while the same were still charged.

The 3rd and 4th defendants filed their submissions on 12th July, 2017. They have submitted that the plaintiff's application has been overtaken by events since the plaintiff lost his right to redeem the suit properties on the fall of the hammer during the public auction. They have submitted further that the suit properties were lawfully acquired by them for value. The 3rd and 4th defendants cited section 99 of the Land Act, 2012 and the cases of Nancy Kahoya Amadiva vs. Expert Credit Ltd & another CA No. 133 of 2016, Mbuthia vs. Jimba Credit Finance Corporation & another CA No. 111 of 1986, Ze Yun Yang vs. Nova Industrial Products Ltd (2003)1EA 362, Bomet Beer Distributors Ltd & another vs. Katherin K. Mbiti & another (2009)eKLR in support of their submission that a chargor loses his right of redemption on the completion of a valid sale agreement.

The 3rd and 4th defendants have submitted that the plaintiff has not established a *prima facie* case with a probability of success which is one of the conditions for grant of a temporary injunction that were enunciated in the cases of Giella vs. Cassman Brown (1973)EA 358 and Mrao vs. First American Bank of Kenya & 2 others(2003)KLR 125. The 3rd and 4th defendants have contended that the plaintiff has failed to show that he has a right over the suit properties after his equity of redemption was extinguished upon the sale of the suit properties.

The 3rd and 4th defendants have argued that damages would adequately compensate the plaintiff since under the Land Act, 2012, the remedy of a party aggrieved by the way a public auction has been conducted lies in damages. The 3rd and 4th defendants have cited the case of American Cynamind Company vs. Ethicon Ltd (1975)AC 396 and argued that the plaintiff's application cannot be determined on a balance of convenience since the plaintiff's suit is frivolous and vexatious. They have submitted that even if the balance of convenience was to be considered, the same would be in their favour as bonafide purchasers of the suit properties for value at a public auction.

While the plaintiff's application for injunction was pending hearing, the 3rd and 4th defendants brought an application by way of Notice of Motion dated 11th September, 2017 seeking an order that the interim orders of injunction that had been granted to the plaintiff on 10th November, 2016 be discharged and the plaintiff's application for injunction dismissed. The application that was supported by the affidavit

sworn by the 3rd defendant on 11th September, 2017 was brought on the grounds that the plaintiff had withheld material facts from the court namely, that out of a sum of Kshs 9,000,000/- that the 3rd and 4th defendants had paid as the purchase price for the suit properties, the plaintiff had withdrawn a sum of Kshs 6,750,000/- being the balance of the purchase price after the loan amount of Kshs 2,250,000/- had been recovered by the 1st defendant.

The 3rd and 4th defendants contended that by withdrawing the entire balance of the purchase price from his loan account, the plaintiff had relinquished his interest in the suit properties and that the application and suit have thus been overtaken by events. The 3rd and 4th defendants annexed to the affidavit in support of their application documents showing that they had paid a sum of Kshs. 9,000,000/- in full and final settlement of the purchase price for the suit properties and a statement of the plaintiff's bank account on which the said sum of Kshs. 9,000,000/- was deposited showing that the plaintiff had withdrawn from the said account over Kshs. 6,288,000/- after the 1st defendant had recovered a sum of Kshs. 2,700,649/- being the loan balance and other charges that were due from the plaintiff. The said bank statement shows that the plaintiff withdrew the said sum of Kshs. 6,288,000/- between 10th April, 2017 and 11th July, 2017. The account which stood at Kshs. 6,296,861.29 as at 13th December, 2016 after the 1st defendant had recovered the monies that were due to it was reduced by the plaintiff to Kshs.-618.71 as at 11th July, 2017.

During the entire period when the plaintiff withdrew the said sum of Kshs. 6,288,000/- the plaintiff never made any deposit in the said account. In support of the application, the 1st defendant filed an affidavit sworn by Irene Kipkorir on 27th September, 2017 in which she confirmed that the plaintiff had indeed depleted the entire balance of the purchase price that remained after the 1st defendant had recovered the monies that were due to it. The 1st defendant also annexed to the said affidavit of Irene Korir a statement of the plaintiff's account showing how the plaintiff withdrew over Kshs. 6,000,000/- from the said account and a letter showing that the plaintiff's advocates on record were notified on 31st August, 2017 of this development.

The plaintiff responded to the 3rd and 4th defendants' application through a replying affidavit sworn on 11th January, 2018. The plaintiff did not deny that he indeed withdrew the entire balance of the purchase price of the suit properties which was in excess of Kshs. 6,000,000/- after the recovery of the loan. The plaintiff blamed the 1st defendant and the 3rd and 4th defendants for the withdrawal of the said amount. The plaintiff claimed that he withdrew the said balance of the purchase price because the same was mixed with his funds in the said account. The plaintiff stated that he is ready and willing to refund the said amount that he withdrew to the 3rd and 4th defendants.

The 3rd and 4th defendant's application is not the subject of this ruling. I have mentioned the same for record purposes only. I had directed that I will give directions on the application after the ruling on the plaintiff's application before me.

Analysis and determination:

I have considered the plaintiff's application together with the two affidavits that were filed in support thereof. I have also considered the defendants' affidavits in reply to the application. Since they were part of the record, I have also perused the affidavits that were filed by the parties in support of and in opposition to the 3rd and 4th defendant's application dated 11th September, 2017 which was filed when this ruling was pending. Finally, I have considered the written submissions by the parties' respective advocates and the various authorities that were cited in support thereof.

What the plaintiff is seeking in the application before me is a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are well settled. In the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and went further to state as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

The plaintiff has put forward three main grounds as the basis of his claim herein against the defendants. The plaintiff has contended that he was not served with the statutory notice and the notification of sale before the suit properties were sold by public auction. The plaintiff has also contended that the suit properties were sold at undervalue. Finally, the plaintiff has contended that the suit properties were matrimonial properties which he acquired jointly with his wife and as such should not have been charged without his wife's consent. The onus was upon the plaintiff to place evidence before the court in proof of these allegations. On the issue of statutory notice and other letters of demand which the 1st defendant claimed to have served upon him, the plaintiff has contended that the postal addresses at which the same were sent, namely, P.O. Box 57566-00200 Nairobi and P.O. Box 328-00202 Nairobi did not belong to him and that he did not receive the said demand notices. The plaintiff has contended that his postal address that was also known to the 1st defendant was P.O Box 6399-00200 Nairobi. With regard to the auctioneers 45 days redemption notice which the 1st defendant has claimed to have served upon the plaintiff through a process server, the plaintiff has contended that the process server, Maina Mwangi who is said to have served him with the said redemption notice on 28th July, 2016 at Rimpa Shopping Centre did not effect such service.

Upon careful consideration of the evidence on record, I am not satisfied that the plaintiff has established a prima facie case against the defendants on all the grounds upon which he has challenged the sale of the suit properties. In the letter of offer dated 23rd June, 2014(annexure IK1 to the replying affidavit of the 1st defendant), it is indicated that the plaintiff had two postal addresses, P.O. Box 6399-00200, Nairobi and P.O.Box57566-00200, Nairobi. In the charge document dated 19th January, 2012(annexure IK2 to the replying affidavit of the 1st defendant), the plaintiff's postal address for service is given as P. O. Box 328-00202 Nairobi. The plaintiff signed both the letter of offer and the charge document. The plaintiff has not persuaded me that the postal addresses, P.O. Box 57566-00200, Nairobi and P. O. Box 328-00202, Nairobi do not belong to him. The plaintiff has contended that these two postal addresses belong to the 1st defendant's other customers. No evidence was placed before the court by the plaintiff showing the owners of these postal addresses. Even it is assumed that the plaintiff's contention is true, the 1st defendant cannot be blamed for using the said postal addresses which the plaintiff himself had provided to the 1st defendant as his addresses for service of notices. Curiously, the postal address, P. O. Box 328-00202, Nairobi through which the statutory notice was served upon the plaintiff and which the plaintiff has claimed in his supplementary affidavit to belong to the 1st defendant's other customer, Lucy Wairimu Kingori is the same address which the plaintiff used in the title deeds for the suit properties both dated 10th November 2011(annexure SKN6 to the supporting affidavit of the plaintiff). These title deeds were issued three (3) years before the plaintiff was granted the loan facilities which are the subject of this suit. This court cannot believe that the plaintiff used the postal address of the 1st defendant's customer in his title deeds even before his relationship with the 1st defendant had commenced. I am of the view that the plaintiff has not established a prima facie case on the alleged non service of the statutory notice.

With regard to the service of the redemption notice and the notification of sale, again, I am not satisfied that a case has been made out that the process server who was engaged by the auctioneer did not serve the plaintiff. The 1st defendant has placed before the court the affidavit of service by the said process server. In the case of Miruka –vs- Abok& Another [1990] KLR 541, it was held that:-

“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect. An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.”

In the case of Karatina Garments Ltd –vs- Nyanarua [1976] KLR 94, the court stated that:-

“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”

The plaintiff did not ask the court to summon Maina Mwangi a process server of this court to be examined on his affidavit of service dated 1st August, 2016. The said process server has given a detailed account on how he traced the plaintiff and served upon him the notification of sale. The plaintiff has not placed any evidence before the court showing that he was not at the place where he is said to have been served with the said notice at the time when he is said to have been served.

On the issue of the property having been sold at undervalue, again the plaintiff just made allegations without any proof. The 1st defendant placed before the court a copy of a valuation report dated 9th March, 2016 on the suit properties that was prepared within a period of six (6) months of the date of sale of the suit properties. The report put the market value of the suit property at Kshs. 12,000,000/- and forced sale value at Kshs. 9,000,000/-. The suit property was sold at Kshs. 9,000,000/-. The plaintiff did not place before the court any evidence showing that the property could have fetched a higher price.

The plaintiff had also claimed that the suit properties were matrimonial properties and that his wife's consent was not obtained before the same were charged to the 1st defendant. I have looked at the letter of offer dated 23rd June, 2014 and noted at page 11 thereof that the plaintiff's wife, one, Linah Yego consented to the suit properties being charged to the 1st defendant to secure a loan that was advanced to the plaintiff.

A part from establishing a prima facie case, the plaintiff was also under a duty to demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages. There is no evidence that the injury likely to be suffered by the plaintiff if the 1st defendant completes the sale of the suit properties to the 3rd and 4th defendants and it turns out at the trial that the sale was illegal cannot be compensated in damages. The suit properties can be valued and the plaintiff compensated accordingly. In any event, there is unchallenged evidence on record that the plaintiff has already received over Kshs. 6,000,000/ being the proceeds of sale of the suit property.

The plaintiff having failed to establish a prima facie case against the defendants and to demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted, it is not necessary for the court to consider the balance of convenience. If I was to consider the balance of convenience, I would have held that the same tilts in favour of the defendants. As I have stated above, the plaintiff has already received a sum of over Kshs. 6,000,000/- being the proceeds of sale of the suit property. It would be unconscionable to have the plaintiff keep the money and the property.

I have said enough to show that the plaintiff's application dated 7th November, 2016 and amended on 15th March, 2017 has no merit. The application is dismissed with costs to the defendants.

Delivered and Signed at Nairobi this 23rd day of February 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Ndiso for the Plaintiff

Mr. Terer for the 1st and 2nd Defendants

Ms. Mweni holding brief for Ms. Murimi for the 3rd and 4th Defendants

Catherine Court Assistant