



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 144 OF 2017

DAVID NJUE M. NJIRU.....PLAINTIFF

VERSUS

HERMAN DAVID MUNYI NGONDI.....1ST DEFENDANT

BIASHARA SACCO SOCIETY LTD.....2ND DEFENDANT

GIANT AUCTIONEERS.....3RD DEFENDANT

RULING

1. By a plaint dated and filed on 13th September, 2017 the Plaintiff filed suit claiming the following reliefs against the Defendants;

a. An order for the 1st Defendant be compelled to clear the outstanding loan and reimburse the sum of Kshs 320,912/- to the Plaintiff being sum of funds paid on behalf of the 1st Defendant by the Plaintiff to the 2nd Defendant with interest thereof. (sic)

b. A permanent injunction restraining the 2nd and 3rd Defendants, their employees, agents and/or servants and anybody claiming through the 2nd and 3rd Defendants from selling and/or disposing off the Plaintiff's land parcel No. Ngandori/Kirigi/8025. (sic)

c. Costs of the suit.

d. Any other or further relief that this honourable court deems fit to grant.

e. At the time of filing the suit, the Plaintiff also filed a notice of motion dated 13th September 2017 under certificate of urgency, seeking the following orders;

a. That this application be certified urgent, be heard during vacation and service be dispensed with in the first instance.

b. Pending hearing of this application inter-parties this honourable court be pleased to issue a temporary injunction against the 2nd and 3rd Defendants, their agents and or servants and anybody claiming through the 2nd and 3rd Defendant from selling alienating, disposing off the Applicant's parcel No. Ngandori/Kirigi/8025.

c. Pending the hearing of the suit herein, this honourable court be pleased to issue a temporary

injunction against the 2nd and 3rd Defendants, their agents and or servants and anybody claiming through the 2nd and 3rd Defendants from selling, alienating, disposing off the Applicant's parcel No. Ngandori/Kirigi/8025.

d. *Costs of this application be provided for.*

e. The said application was grounded upon the supporting affidavit sworn by the Plaintiff on 13th September 2017, together with the annexures thereto. In the said affidavit, the Plaintiff averred that he was the registered proprietor of *Title No Ngandori/Kirigi/8025* (hereinafter referred to as the "suit property") which he had charged to the 2nd Defendant to secure a loan of Kshs 600,000/- granted to the 1st Defendant by the 2nd Defendant.

f. It was further stated that when the 1st Defendant defaulted on the said loan, he visited the 2nd Defendant which offered him the option of taking over the loan in his own name in order to stop the sale. He confirmed in paragraph 6 of the affidavit that he took it over.

g. The Plaintiff further stated that when he informed the 1st Defendant of the aforesaid arrangement, the 1st Defendant promised to assist in offsetting the loan but he failed to keep his promise.

h. It was the Plaintiff's case that the 1st Defendant was a person of means who had deliberately refused to pay off the loan he had taken. He wanted the court to order the 1st Defendant to clear the outstanding loan and reimburse him the sum of Kshs 320,912/- which he had paid to the 2nd Defendant on his behalf.

i. The Plaintiff faulted the intended sale on the basis that he received the notification of sale and redemption notice late. He denied having received the 3 months statutory notice of default as required by law.

j. The 2nd Defendant filed a replying affidavit in opposition to the Plaintiff's said application. The affidavit was filed by Joseph Kamau who described himself as chairman of the 2nd Defendant. He confirmed that the Plaintiff had, indeed, guaranteed the 1st Defendant the loan facility granted by the 2nd Defendant. He confirmed that the Plaintiff charged the suit property to secure repayment of the loan; that the 1st Defendant defaulted in repayment thereof; that the Plaintiff took over the loan and that he too defaulted.

k. It was the 2nd Defendant's case that all requisite notices were served upon the Plaintiff and that he had no cause of action against the 2nd Defendant. The 2nd Defendant urged the court to dismiss the said application and allow it to exercise its statutory power of sale.

l. The Plaintiff filed a further affidavit on 1st November 2017 in which he denied taking over the 1st Defendant's loan. He also stated that was not given an opportunity to pay the loan by instalments and that the 2nd Defendant had failed to utilize alternative modes of debt collection against the 1st Defendant. He accused the 2nd Defendant of levying excessive and illegal interest on the loan without giving any particulars thereof.

m. The 1st Defendant filed his replying affidavit on 5th December 2017 in opposition to the Plaintiff's said application. He pointed out that there were contradictions between the Plaintiff's supporting affidavit and the further affidavit. He stated that the Plaintiff did not come to court with clean hands and that his application was frivolous, vexations and an abuse of the court process.

n. When the Plaintiff's said application came up for hearing on 2nd November 2017, the advocates

for the parties agreed to dispose of the said application through written submissions. At the time of preparing the ruling, however, only the Plaintiff and the 1st Defendant had filed written submissions. The 2nd Defendant's submissions were not in the court file.

o. This being an application for interlocutory injunction under Order 40 of the Civil Procedure Rules, the court shall be guided by the 3 principles for the grant of an injunction as enunciated in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358.**

p. The first is whether the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial hereof. The court notes from the record that it is not denied that the Plaintiff guaranteed the 1st Defendant a certain loan facility from the 2nd Defendant. It is common ground that the Plaintiff charged the suit property to secure repayment of the loan. It is admitted that the 1st Defendant defaulted. It is admitted that the Plaintiff took over the loan facility and partially serviced it before defaulting as well.

q. The only legitimate issues in controversy relate to service of the 3 months statutory notice of default under **section 90 of the Land Act 2012** and service of the notification of sale under **section 96 (2) Land Act, 2012.** Although there is on record a copy of a notification of sale, none of the parties exhibited a copy of the 3 months' statutory notice required under **section 90 of the Land Act.** The 2nd Defendant alleged in the replying affidavit that all notices were served but none was exhibited. It is therefore doubtful if it was ever served, and if served, whether it complied with the statutory requirements.

r. The court, therefore, finds that there is no evidence on record to demonstrate that such notice was served. In the absence of service of such a crucial notice, the court holds that the 2nd Defendant's statutory power of sale had not crystalized at the time the suit property was advertised for sale. For what reason, the court is of the view that the Plaintiff has satisfied the 1st ground for grant of an interlocutory injunction.

s. The 2nd principle relates to adequacy of monetary compensation. On the basis of the material on record, the court is satisfied that the Plaintiff would suffer irreparable damage unless the order of injunction is granted in view of the 2nd Defendant's non-compliance with statutory provisions of the **Land Act, 2012.** As was observed in the case of **Elizabeth Wambui Njuguna Vs Housing Finance Co of Kenya Ltd [2006] eKLR;**

"...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of a statute, which derogates from the chargor's equity of redemption."

18. The 3rd principle relates to balance of convenience. The court is of the view that the balance of convenience tilts in favour of the Plaintiff in view of my findings on the 1st and 2nd principles. As was observed by the Court of Appeal in the case of **Kisima Holdings Ltd & Another Vs Fidelity Bank Ltd [2013] eKLR;** **"...the balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances."**

19. The court is aware that the Plaintiff is seeking an equitable remedy. An equitable remedy is a discretionary remedy which may be denied even where the Applicant may have satisfied the formal requirements on account of his conduct. The court is least impressed by the Plaintiff's conduct in these proceedings. Although the Plaintiff has admitted the charge and the default on the loan, he has filed two contradictory affidavits in a bid to run away from his legal obligations.

20. In his supporting affidavit, he admits having taken over the 1st Defendant's loan. He admits having serviced the loan for some time before defaulting. However, in his further affidavit, filed about one

month later, he denies having taken over the 1st Defendant's loan. If he never took the loan, why would he pay over Kshs 320,000/- towards its settlement? And why would he complain in the further affidavit that he was not given the opportunity of repaying the loan by instalments? The Plaintiff was blowing hot and cold at the same time. He is not an honest person.

21. The Plaintiff has sought an order of injunction pending the hearing and determination of the suit. If such blanket order were to be granted, it would aid the Plaintiff in escaping or delaying fulfilment of his financial obligations. The court is, therefore, inclined to grant a conditional interim order to enable the 2nd Defendant issue and serve appropriate notices under the Land Act and the Auctioneers Act before exercising its statutory power of sale in case the outstanding loan is not settled. As was stated in the case of ***National Bank of Kenya Vs Shimmers Plaza Ltd [2009] eKLR:***

“The duration of an order of injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case, the duration of the injunction until determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice then the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

22. In the result, the Plaintiff's notice of motion dated 13th September 2017 is allowed only in the following terms;

- a. A temporary injunction is hereby issued restraining the 2nd Defendant from selling, alienating or disposing of *Title No. Ngandori/Kirigi/8025* until the requisite statutory notices under sections 90 and 96 of the Land Act, 2012 are issued and served.
- b. Upon service of the notices specified in paragraph (9) hereof and compliance with any other legal provisions relating to such sale, the 2nd Defendant shall be at liberty to exercise its power of sale.
- c. Costs of the application shall be in the cause.
- d. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 15th day of FEBRUARY, 2018

In the presence of Ms Muriuki holding for Mr P.N. Mugo for the Plaintiff, Mr Guantai holding brief for Mr Mugambi Njeru for the 1st Defendant and in the absence of the 2nd and 3rd Defendants.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

15.02.18