



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 132 OF 2017

FORMERLY MERU ELC. 149 OF 2011

M'MBWANI M'NJAU.....PLAINTIFF

VERSUS

K-REP BANK LTD.....1ST DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTMENT.....2ND DEFENDANT

EDIEL KIRIMI M'MBWANI.....3RD RESPONDENT

RULING

1. This suit was to be heard on 7th February, 2018. When it was called on outside court as is required by the provisions of Order 12 of the Civil Procedure Rules, only the 3rd defendant was in court.

2. Advocate Majau, holding brief for advocate Rimita, told the court that Mr.Rimita, the plaintiff's advocate was not ready to take part in the hearing slated for today because he was engaged elsewhere. The nature of his engagement elsewhere was not explained. I, however, pose the question: Assuming that he was present in court and was ready for the hearing, how would he have proceeded without the presence of his client, the plaintiff?

3. The plaint in this suit is dated 3rd November, 2011. Over 6 years later, this suit has remained unheard and undetermined. The Court record shows that since delivery on 26.7.2013 of a ruling concerning an application dated 3rd November, 2011 which had been filed by the plaintiff, the plaintiff seemed to have lost any interest in this suit. It is only on 15th June, 2017, about 4 years later that the plaintiff obtained a date for directions to be taken on 19th July, 2017. It is pellucid that this suit had qualified to be dismissed in terms of Order 17 Rule 2 of the Civil Procedure Rules. However, for clearly unexplainable reasons, this suit escaped dismissal.

4. This court's ruling delivered on 26th July, 2013 which denied the plaintiff the injunctive orders he had sought may have punctured his verve in his pursuit of this suit. To put matters into perspective, that ruling is reproduced in full herebelow.

RULING

This application is dated 3rd November, 2011 and prays for orders:

1. That this application be certified as urgent and be heard ex-parte in the first instance.

2. That pending the hearing of this application inter-parties this honourable court be pleased to issue temporary orders of injunction restraining the 1st and 2nd defendants, their agents, servants and/or employees or whomsoever acting on their behalf or instructions from selling, re-advertising for sale or in any other matter whatsoever from dealing with land reference No.KARINGANI/MUGIRIRWA/1043.

3. That this honourable court be pleased to issue orders of injunction restraining the 1st and 2nd defendants, their agents, servants and/or employers or whomsoever acting on their behalf or instruction from selling, re-advertising for sale or in any other matter (sic) whatsoever from dealing with land reference No. KARINGANI/MUGIRIRWA/1043 pending the hearing and determination of this suit.

4. That costs of this application be provided for.

The application is premised upon the following grounds:

1. That the 1st defendant has engaged the 2nd defendant to advertise and sell land reference L.R. No. KARINGANI/MUGIRIRWA/1043 by public auction.

2. That the plaintiff has not been issued with 90 days period notice as required by the law and neither has he been notified by the 1st defendants of the 3rd defendant's default in repaying the guaranteed amount as required by the law.

3. That the 1st defendant and the 3rd defendants are acting in bad faith in seeking to dispose of L.R. NO. KARINGANI/MUGIRIRWA/1043 without giving due notice to the plaintiff to enable him redeem the property as provided by the law.

4. That the plaintiff stands to suffer loss and irreparable damage if the property is sold as intended by the 1st and 2nd defendants and the land parcel is his only source of livelihood and upon which he has established homestead and other developments.

5. That this honourable court ought to come to the rescue of the plaintiff/applicant and issue injunctive orders as prayed.

6. That the prayers sought for by the plaintiff/applicant are meant to preserve the status quo and will not in any way prejudice the defendant's case, if any.

The application was certified urgent and interim orders in terms of prayer 2 were granted by the Hon. Justice Apondi, J, on 4.11.2011.

At some stage the parties had indicated that they were holding negotiations with a view to arriving at an amicable settlement. Eventually, they resolved that the application be heard by way of written submissions.

The facts in this matter are that the 3rd defendant who is apparently the son of the applicant/plaintiff obtained a loan from the 1st defendant. The loan was secured by, among others, a legal charge over L. R. NO. KARINGANI/MUGIRIRWA/1043 registered in the name of the appellant. The loan was disbursed but at some point in time the 1st defendant instructed the 2nd defendant to sell by public Auction the suit land, to wit, L.R. NO. KARINGANI/MUGIRIRWA/1043. As a result, the plaintiff filed a suit in court as well as this application.

The application is supported by the grounds already set out herein, a supporting affidavit and a further affidavit. The general tenor of the applicant's arguments is that the 1st and 2nd defendants were improperly intending to sell the suit land because of inter alia;-

1. They had failed to give him the requisite statutory notice and also not notified him that the 3rd

defendant had defaulted in repaying the guaranteed amount.

2. They were acting in bad faith as they did not give him notice which would have allowed him to repay the loan.

In submissions, it was argued that the 1st defendant can not purport to exercise the right of sale under the charge between it and the plaintiff without first selling the securities offered by the 3rd defendants. It was also submitted that the 1st defendant disbursed more money in breach of the contract established by the charge and for that reason the charge could not form the basis of the right to sell the plaintiff's land. It was further submitted that in addition to failure to give Statutory Notice, the 1st defendant was bound to give notice to the District Commissioner of the area where the suit land is.

For the 1st and 2nd defendants, it was submitted that the plaintiff had guaranteed the loan obtained by the 3rd defendant and the loan was, among others, secured through a legal charge over L. R. NO. KARINGANI/MUGIRIRWA/1043 registered in the name of the applicant. The 3rd defendant had defaulted in repayment and as the purpose of securing a loan facility is to protect the lender from unscrupulous borrowers, it was necessary where default occurred to recover the amounts lent by realizing the security offered.

The case of *Ooko Vs Barclays Bank of Kenya Ltd* [2002] eKLR was cited as authority that a charger cannot be restrained from exercising the Statutory Power of sale which had validly arisen over a dispute regarding the amount due for payment.

The 1st and 2nd respondents insisted in their submissions that proper Statutory Notice had been given and the plaintiff being the father of the 3rd respondent knew about the default by his son to repay the loan and was merely colluding with his son not to pay the owed amount. As a result, the 1st respondent continued to suffer losses and any further delay would exacerbate the losses.

It was also submitted that the applicant had soiled himself with unclean hands as he had instituted a similar suit, namely *Meru C. M. C.C. No. 171 of 2011* which was struck out with costs. It was further proffered that the applicant had even failed to pay the 1st respondent the costs of that suit. According to the 1st respondent, this buttressed its argument that the applicant had unclean hands and since equity disowns he who comes to it with unclean hands, the applicant's application should be dismissed.

The submissions of the 3rd defendant merely constitute the admission that he did borrow money from the 1st defendant and that, among other parcels, he had used the plaintiff's parcel of land No. KARINGANI/MUGIRIRWA/1043 as security. He, however, said that the 1st defendant had not notified him about the intended auctioning of the suit land.

I have considered the averments and the submissions of the parties. I have also considered the proffered authorities.

I note that ground (f) of the application states:

“THAT the prayers sought for by the plaintiff/applicant are meant to preserve the Status Quo and will not in any way prejudice the defendant's case if any”

This application is dated 3rd November, 2011. Temporary Orders were issued on 11.4.2011. As the 1st defendant is lamenting, the loan continues to attract interest and thereby increasing the indebtedness of the borrower and enhancing the losses of the 1st defendant. I do not agree that a guarantor's security can only be realized after the securities offered by the borrower have all been sold. What if there are no willing purchasers for example?

There are claims and counter claims regarding the issue of the Statutory Notice. I, however, tend to agree with the 1st defendant that the statutory Notice had been given. The injunction being sought seeks to restrain the 1st and 2nd defendants, among others, from selling, re-advertising for sale or in any other way

manner (sic) whatsoever from dealing with land reference No. KARINGANI/MUGIRIRWA/1043 pending the hearing and determination of this suit". To me this would be a draconian order considering that the plaintiff had willingly offered his land to the 1st defendant as security for the loan obtained by the 3rd defendant.

This being an interlocutory application, I will take care not to delve into matters which deserve handling at the hearing and determination of the main suit. At this stage, I only need to rely on the relative weight of the parties propositions. I find that the applicant has not satisfied the conditions for the grant of an injunction. The applicant has not shown that the intended sale of the suit land to realize a security is unlawful, null and void. He has not established a prima facie case. As I have already stated I am inclined to believe the 1st and 2nd respondents that the apposite Statutory Notice was given.

One of the other conditions for grant of an injunction is that the applicant will suffer an irreparable injury which cannot be compensated by an award of damages. I find that the 1st respondent would be able to financially compensate the plaintiff should he win the suit eventually. One might say that there is sentimental value in the land in question, therefore, making the loss irreparable. I hazard to say this; where a party has offered land as security to a financial institution, the irreparable sentimental value is only extant as long as the borrowing party does not default or other satisfactory arrangements are made. The circumstances herein enervate the sentimental value of the suit land veritably.

Inexorably, the upshot is that the application for injunction is dismissed with costs to the 1st and 2nd respondents.

Delivered and signed in open court this 26th day of July, 2013.

E. Kimathi for 1st and 2nd defendants

Kieti holding brief for Rimita for plaintiff/applicant

P. M. NJOROGE

JUDGE

5. Order 12 gives guidance regarding what happens when parties do not come to court when a hearing date has been fixed by the court. What is stressed by Order 12 is the presence of the parties. It is not the presence of their advocates. Their advocates may proffer explanations regarding why suits should be adjourned. Their presence cannot substitute the presence of the parties.

6. In this matter, only the 3rd defendant was in court. The non-attendance by the other parties is not explained at all. It is conceivable that the hearing of a suit may have to be adjourned for cogent reasons such as sickness, bereavement etc. The only reason given today that the suit should be adjourned is that the plaintiff's advocate is engaged elsewhere in Nairobi. But where is the plaintiff who is one of the parties envisaged by the provisions of Order 12, Civil Procedure Rules?

7. The 3rd defendant has got no counterclaim which he can go ahead to prove in so far as the burden of proof lies on him.

8. In the circumstances, this suit is dismissed in terms of the applicable provisions of Order 12 of the Civil Procedure Rules.

9. No costs are awarded

10. It is so ordered

Delivered in open court at Chuka this 7th day of February, 2018 in the presence of:

Ca: Ndegwa

