



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 879 OF 2017

ELIZABETH WAMBUI NJUGUNA.....PLAINTIFF

VERSUS

SPRINGBOARD CAPITAL LIMITED.....DEFENDANT

RULING

The application before Court for determination is the Plaintiff's Notice of Motion dated the 3rd October, 2017 and filed on 4th October, 2017 brought pursuant to Section 3 and 3A of the Civil Procedure Act, Order 40 rules 1, 2 and 4 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 Plaintiff is the owner of land parcel number KAJIADO/KAPUTIEI – NORTH/30920 hereinafter referred to as the 'suit land'. The Plaintiff entered into an oral agreement with one Paul Chiira Gichuki and offered the suit land as collateral to the Defendant to lend monies to him, to be repaid over a period of 24 months. The borrower has been making payments upto May, 2017 when he experienced financial constraints and the Defendant is threatening to send auctioneers to proclaim the suit land where the Plaintiff is in occupation, which action will render her a destitute. The Plaintiff will suffer irreparable loss and damage if the Defendant is not restrained from selling the suit land.

The application is supported by the affidavit of ELIZABETH WAMBUI NJUGUNA, the Plaintiff herein where she deposes that she guaranteed the borrower using her title to the suit land, to be granted a loan of Kshs. 2.5 million by the Defendant. She states that the suit property is developed and the said development being a residential house currently occupied. She confirms that on 8th June, 2017 she received a letter from the Defendant threatening to dispose of the suit land within three (3) months from the said date if the borrower failed to repay the loan. She claims the borrower informed her he had been repaying the loan and insists as a guarantor, the Defendant ought to have informed her the moment there was a first default.

The application is opposed by the Defendant whose Director and Chief Executive Officer WILSON KARANJA filed a replying affidavit where he confirms that on 8th May, 2015 the borrower obtained a loan of Kshs. 2.5 million from the Defendant which was secured by a legal charge over the suit land. He insists the Plaintiff accepted to guarantee the borrower and executed the Charge document with all the knowledge of the liabilities and duties of the guarantor. He claims the borrower failed to make the requisite payments contrary to the contractual terms of the Charge dated the 15th April, 2015 and fell into arrears to which the Defendant wrote to the Borrower on 30th December, 2016 and further on 25th January, 2017 demanding that he settles the outstanding arrears but he failed to do so. He avers that on 8th June, 2017 the Defendant wrote to the Plaintiff notifying her that the Borrower was in arrears of Kshs. 1, 111,986.98 and further notifying her that after the lapse of three (3) months, the Defendant would exercise its statutory power of sale in accordance with section 98 of the Land Act if the arrears were not settled. He reiterates that the Plaintiff nor the Borrower responded to the notice and after three (3) months, the Defendant instructed the auctioneers to realize the security by selling it through public auction. He reaffirms that the Plaintiff in conjunction with the Borrower are intent on defrauding the Defendant with the Plaintiff not having clean hands as she brought the application in October, 2017, yet the notice was issued in June, 2017. Further that the Borrower has not made payments since May, 2017 and neither did the Plaintiff furnish any evidence towards repayment of the loan.

The Plaintiff filed a further affidavit where she reiterated her claim and deposed that the Borrower has been making payments and insists the Defendant never instructed Auctioneers to dispose of the suit land since no advertisement has been made. She denies receiving any communication from the Defendant regarding the loan repayment and states that the Defendant was communicating with the Borrower on the same and she was in the dark. She insists she has established a prima facie case, her application raises triable issue and the Valuation done by the Defendant on the value of the suit property is outrageous with her recently assessed value exceeding the amount claimed.

Both parties filed submissions, which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 3rd October, 2017 including the supporting and replying affidavits, as well as the annexures thereon plus the submissions, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to interim injunction pending the outcome of the suit.

The Plaintiff admits guaranteeing a loan on behalf of the Borrower from the Defendant and used her title deed to the suit land as collateral, which was charged as security over the loan. She however claims she was not aware of the default in repayment and was shocked to be served with a letter from the Defendant stating their intention to sell the suit land if the Borrower did not settle the outstanding arrears. The Plaintiff insists the Borrower has been repaying the loan upto May, 2017 when he failed to do so due to financial constraints. The Defendant contends that the Borrower is in arrears and that in September, 2017 he requested for six months to be able to repay 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 line with this principle, I wish to interrogate whether the Plaintiff has made out a prima facie case with a probability of success.

The question we need to ask is whether the Plaintiff was aware of the obligations of a guarantor when she granted the title to the suit land as security for the Defendant to extend a loan facility to the Borrower. Further, whether failure of the Defendant to inform the Plaintiff of the first default is a ground for an injunction. I note the Plaintiff admitted having been explained for by the Borrower what the Charge and Guarantee documents entailed.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: *' a prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the other.'*

I concur with the Defendant's assertions that the Plaintiff accepted to guarantee the borrower and executed the Charge document with the full knowledge of the liabilities and duties of the guarantor. Further that once the suit land was charged, it became a commodity which is capable of being sold in case of default so long as all the proper legal procedures are adhered to, before the same is disposed of. I note the Borrower was not enjoined in this suit to explain himself and the issue of the default. Further that the Plaintiff although insisting the Borrower has been servicing the loan, did not furnish Court with any proof. All these point to the fact that the Plaintiff has not come to court with clean hands. Injunctive orders are equitable remedies and the party seeking it, is expected to have clean hands. Based on the facts above, and relying on the two authorities, I find that the Plaintiff has not demonstrated a prima facie case to warrant the grant of an injunction.

On the issue of irreparable harm which cannot be compensated by way of damages, the Plaintiff claims she resides on the suit land and she would suffer irreparable harm if the same was sold. In the **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's alleged injuries are speculative but she has not demonstrated that the harm she will suffer if the injunctive orders are denied will be irreparable with no amount of damages compensating it.

On the question of balance of convenience, I note the Plaintiff was a guarantor to the Borrower and she confirmed that she understood what this entailed. 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 authorities and facts 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 3rd October, 2017 is not merited and is dismissed with costs.

Dated signed and delivered in open court at Kajiado this 1st day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Morara holding brief for Muoka for Plaintiff

N/A for Defendant