



REPUBLIC OF KENYA

IN THE EVINVERNMENT AND LAND COURT AT MIGORI

ELC CASE . NO. 768 OF 2017

TOBIAS ONYANGO KICHULA.....PLAINTIFF

VERSUS

MATHEW MUOK.....1ST DEFENDANT

EQUITY BANK (KENYA) LIMITED.....2ND DEFENDANT

RULING

1. By a plaint (Fast Track) dated 31st July, 2017, the plaintiff has sued the 1st and 2nd defendants for the following reliefs:

a) An injunction order be issued permanently restraining the 1st and 2nd defendants herein, either by themselves, servants, agents and/or any other person claiming authority under any of them from alienating, disposing and/or causing any sale either by private treaty or public auction and/or interfering with the plaintiff's ownership of all that land parcel LR. NO. SUNA EAST/WASWETA 1/13658 situated in Migori town within Migori county.

b) The 1st and 2nd defendants herein be put on account on the loan repayment and any resultant illegal & exponential growth of the same be ordered to be borne by them.

c) A mandatory injunction order be issued compelling the defendant herein jointly and/or severally to release unconditionally to the plaintiff the title deed of all that land parcel LR. NO. SUNA EAST/WASWETA 1/13658 situated in Migori town within Migori County.

d) Costs of and incidentals to this suit.

2. The Plaintiff is represented by learned counsel Mr. Tom Mboya of M/S Tom Mboya and co. Advocates. There is no appearance for the 1st defendant. The 2nd defendant is represented by learned counsel Ms Rweya instructed by M/s Meritad Law Africa LLP Advocates.

3. Simultaneously with the plaint, the plaintiff filed a Notice of Motion dated 31st July, 2017 (hereinafter referred to as the application) against the Defendants brought under Order.....He is seeking the following principal orders;-

a) Spent

b) Spent

c) *THAT this Honourable court be pleased to issue an injunction order restraining the 1st and 2nd defendants herein, either by themselves, servants, agents and/or any other person claiming authority under any of them from alienating disposing and/or causing any sale either by private treaty or public auction and/or interfering with the plaintiff's ownership of all that land parcel LR. NO. SUNA EAST/WASWETA1/13658 situated in Migori town within Migori County pending the hearing and determination of the substantive suit herein.*

d) *THAT the cost of this application be provided for.*

e) *THAT any other/further relief that this honourable court may deem fit and proper to grant in the circumstances.*

4. The application is anchored on an affidavit sworn on 31st July, 2017 by the plaintiff together with copies of a title deed, a certificate of official search and a public auction advert in respect of the suit property and grounds on the face of it. The grounds include;

a) THAT while the 2nd defendants knew and/or ought to have known that the 1st defendant had defaulted and/or remained in default of servicing the loan between themselves, it appears that through conspiracy between its staff and the said 1st defendant, the plaintiff was kept in the dark until the whole loan amount grew exponentially beyond the limit of the plaintiff's guarantee.

b) THAT by allowing the said loan to grow beyond the plaintiff's guarantee limit, the 1st and 2nd defendant herein had a fraudulent design against the plaintiff's right of recovery of his family land parcel LR. NO. SUNA EAST/WASWETA 1/13658..

c) THAT the 1st and 2nd defendants joint and/or several acts of fraud would abrogate and/or infringe on the plaintiff's right to ownership of property.

d) THAT allowing this application would enable the ends of justice being met to all the parties herein on a priority basis.

5. The 2nd defendant opposed the application in a 27 paragraphed replying affidavit sworn on 11th September, 2017 by Dickson Okerosi, the credit manager of the 2nd defendant. Accompanying the replying affidavit are documents , inter alia;-

a) a ruling of 19.1.2017 in Migori CMCC No. 689 of 2016; Mathew Muok-vs-Equity Bank (Kenya) Limited (hereinafter referred to as the Migori CMCC suit)-marked DO1

b) a charge dated 14th October, 2014 over the suit property-marked DO3

c) a Deed of guarantee and indemnity executed by plaintiff in favour of 1st defendant on 14th October, 2014-marked DO4

d) a Chattels mortgage dated 13th October, 2014-marked DO5-

e) 1st defendant's account statement-marked DO6

f) notice of exercise of statutory power of sale dated 8th January, 2016-marked DO8

g) a redemption notice dated 20th April, 2016-marked DO9

h) a Notification of sale dated 18th May 2017-marked DO10

6. Concurrent with the replying affidavit, the 2nd defendant filed grounds of opposition dated 11th September, 2017. These grounds are;

1) The plaintiff's application is mischievous and is only bent on depriving the 2nd defendant's rights as a financier.

2) There is no positive and enforceable order, which is capable of execution by the plaintiff/applicant for the reason that the matter has been adjudicated and determined before another court being CMCC NO. 689 of 2016, MIGORI MATHEQ MUOK VERSUS EQUITY BANK (KENYA) LIMITED therefore there is nothing for this court to stay, enforce or restrain by an order of injunction.

3) The application lacks merit and is an abuse of the court process as no sufficient reasons have been shown why the injunctive orders ought to be granted.

4) The plaintiff/applicant is guilty of laches; gross and unreasonable delay; suppression of material facts, and thus the plaintiff cannot be entitled to the discretion of the court.

5) THAT the plaintiff is seeking for an injunction using the back door, pretending to be asking for interpretation of the charge document and the interpretation or validity of the charge document and deed of guarantee and indemnity and that cannot be used to obtain an order preserving the status of the suit property.

6) The plaintiff has not satisfied the requisite conditions to warrant granting the orders of temporary injunction.

7) The said Notice of Motion application is misconceived, bad in law, incurably defective.

8) The orders sought are not obtainable and the plaintiff's application ought to be dismissed with costs to the 2nd defendant.

7. In a further affidavit sworn on 20th September, 2017, the plaintiff averred that his claim is about risk currently attached to his family land and that he is not a party to Migori CMCC suit in which the chief magistrate's court has no jurisdiction. He further averred that he has demonstrated a prima facie case against the defendants for the application to be allowed to conserve the suit property during the pendency of the substantive suit.

8. Learned counsel for the plaintiff filed a list of authorities dated 21st September, 2017 and skeleton submissions dated 14th November 2017. He submitted on background facts of the application and identified four (4) issues for determination as follows;

- a) whether the applicant/plaintiff has a prima facie case with probability of success,
- b) whether the applicant/plaintiff will suffer irreparable loss if the application is not granted
- c) whether there is a balance of convenience in this matter
- d) whether the Migori CMCC No. 689 of 2016 has effect on the matter
- e) who shall bear costs of the application ?

9. Counsel urged the court to allow the application with costs to the plaintiff/applicant and analysed all the four (4) issues for determination. He cited the following authorities;

- a) Mrao-vs-First American Bank (2003) KLR 125 that a prima facie case in a civil application includes but is not limited to a “genuine and arguable case”.
- b) Steven Mason & McCathy Tetrant, R J R Macdonald-vs-Canada (Attorney General)
- c) Migori CMCC NO. 689 OF 2016 where the plaintiff is the 1st defendant in the present suit
- d) Owners of Motor vessel “Lillian S”-vs Caltex Oil (Kenya) Ltd (1989) KLR 1 on jurisdiction of courts
- e) Halsbury’s Laws of England

10. Learned counsel for the 2nd Defendant filed submissions dated 9th November 2017. The submissions exceeded 10 pages against the requirement of **direction number 33 (b) of the Environment and Land Court Practice Directions, 2014**. Nonetheless being conscious of **Article 159 (2) (d) of the Constitution of Kenya, 2010 and Section 19 (1) of the Environment and Land court Act, 2015 (2011)**, I take into account the submissions. Counsel submitted on the background of the plaintiff’s application and background of the loan facility. That the main cause of action is a banking transaction, default was on the part of the 1st defendant and the plaintiff. Counsel relied on the Migori CMCC suit, **Section 6 of the Civil Procedure Act Cap 21**, Section 90 of the Land Act, 2012 and that this court lacks jurisdiction over the matter pursuant to 165 (5) of the Constitution of Kenya, 2010.

11. Counsel further submitted that seven (7) issues fall for determination by the court. These issues are ;-

- a) *The plaintiff’s right and duties under the Deed of Guarantee and indemnity and the implication thereof.*
- b) *Whether the defendant’s right of redemption has crystallized ex debito justitiae.*
- c) *Whether the plaintiff was duly served with the statutory notices and the legality of the 2nd defendant to exercise its statutory power of sale and consequential sale by auction.*
- d) *Plea of Matrimonial property*
- e) *Jurisdiction of the court.*
- f) *Whether the plaintiff is entitled to interim injunction pending hearing of the suit as prayed.*
- g) *Whether the 2nd defendant is entitled to costs.*

12. Counsel also filed a list of authorities dated 9th January, 2018, namely;-

- a) Kenya Commercial Bank Ltd Vs. Muiri Coffee Estate Ltd & 3 others Civil Appeal No. 100 of 2010 on page 11 & 14.
- b) Civil Appeal No. 63 of 2012, Lalji Karsan Rabadia & 2 others Vs. Commercial Bank of Africa Limited {2015} EKLR of Page 3 & 4,
- c) Civil Appeal Case No. 1522 of 2001, Surgipharm Ltd Vs. Awuondo & another (2003) EKLR
- d) Dorice Achola Odera Vs. Stephen Karanja t/a Dalali traders & Another (2016) EKLR on page 3,4
- e) David Ngugi Ngaari Vs. Kenya Commercial Bank Limited (2015) EKLR on page 8,9.

13. I have carefully looked at the application, the grounds of opposition, the replying affidavit, the further affidavit and submissions including list of authorities filed and cited by counsel to the respective parties in the application. Therefore, issues that emerge for determination are;

- a) Is there any bar to this court to entertain the application?
- b) Has the plaintiff satisfied the three (3) conditions for grant of injunction?
- c) Who is to bear costs of this application?

14. The 2nd defendant contended that the matter has been adjudicated and determined by another court vide the Migori CMCC suit, whereby the 1st defendant was granted a conditional order on 19th January, 2017. I called for the Migori CMCC's file and I perused it. I noted therein that the 1st defendant sued the 2nd defendant in relation to a loan of Ksh. 1,200,000/= obtained by the 1st defendant from the 2nd defendant and the plaintiff guaranteed the loan facility by a charge over the suit property. By a Notice of Motion application dated 28th June, 2016 in the CMCC suit, the 1st defendant sought, inter alia, orders of injunction against the 2nd defendant. On 19th December, 2017, in his ruling on the Notice of motion, the learned magistrate Hon. E.M. Nyagah (PM), observed, that;

“The applicant has admitted that he secured a loan facility of Ksh.1,200,000 from the defendant and that one Tobias Onyango Kichula being the registered proprietor of the aforementioned property guaranteed the same.”

15. Consequently the learned magistrate relied on the case of **Al-Jalal Enterprises Ltd-vs-Gulf African Bank Ltd (20140 eKLR)** and determined the Notice of motion by issuance of a conditional order, thus;-

“From the foregoing, I will allow the application on the following terms;

- a) Applicant pay accrued arrears within 90 days from the date hereof
- b) The applicant shall then continue to pat the agreed monthly instalments
- c) Failure to abide by any of the conditions, the respondent (read 2nd defendant)
shall be at liberty to fully exercise it's rights under the loan facility.” (Emphasis supplied)

16. Section 5 of the Civil Procedure Act (Cap 21 Laws of Kenya) provides :-

“Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.”

17. Moreover, Section 6 of the CPA reads;

““ No court shall proceed with the trial of any suit or proceeding in which the matter in Issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed .” (Emphasis supplied).

18. It is not disputed in the application that the 1st defendant obtained a loan facility of Ksh,1, 200,000/= from the 2nd Defendant whereby the plaintiff offered the suit property as security for the facility. Once a property is offered as a security for a bank loan, it becomes a commodity for sale whose loss can be adequately compensated in damages as recognized by S M Kibunja J in **Dorice Odero case** (supra). The liability of the guarantor to the full extent of his obligation without notice to the default or previous recourse against the principal debtor would arise where there is a default by the Principal debtor causing loss to the creditor; See **Surgipharm Ltd case** (supra).The liability applies where there is default by the principal debtor who has been formally notified to pay the debt. Nonetheless the plaintiff is obliged to satisfy the conditions laid down in **Giella-vs-Cassman Brown & co. Ltd (1973) EA 358** for the grant of the injunctive orders sought in the application.

19. The plaintiff has to demonstrate to the court that as a surety in the guarantee contract he has ensured that the 1st defendant whom he guaranteed the loan facility paid the arrears to the 2nd defendant within 90 days from the 19th January, 2017 when the orders were made in the Migori CMCC suit. Moreover, he has not shown that he has ensured that the 1st defendant is continuing to pay the agreed monthly instalments in the contract of guarantee as ordered by that court which has jurisdiction over the matter. In the case of **Lalji Karshan Rabadia** (supra), the Court of Appeal stated, inter alia;-

“A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations...” (Emphasis added)

20. Be that as it may, the suit property in the instant application is directly the same matter in issue in the Migori CMCC suit in which an application was determined between the 1st and 2nd defendants on 19th January, 2017. The same parties are the defendants in the instant suit under whom the plaintiff lays his claim. The plaintiff and the defendants are litigating under the same title in which the plaintiff offered the suit property for a loan facility obtained by the 1st defendant from the 2nd defendant. I therefore, find **Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya**, applicable to the instant suit.

21. By the way, the plaintiff may consider to be enjoined as a party to the Migori CMCC suit which is still pending determination.

22. A fortiori, I find that by virtue of Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya, this court is debarred from entertaining the present proceedings between the parties. The plaintiff's application dated 31st May 2017 is unmerited.

23. Accordingly I make the following orders;-

a) I strike out the plaintiff's application dated 31st July, 2017.

b) I vacate interim orders issued by this court on 31st July, 2017 and extended on 3rd of August, 2017

c) On costs, given the findings made hereinabove, the same shall be in the cause.

Dated, signed and delivered at Migori this 1st day of February, 2018

G M A ONGONDO

JUDGE

In the presence of:

Mr. Godia learned counsel holding brief for Rwenya learned counsel for the 2nd Defendant/Respondent

Lori, court assistant