



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 20 OF 2017

LAWRENCE OJIAMBO MUGENI.....PLAINTIFF

VERSUS

FAMILY BANK LTD.....DEFENDANT

RULING

1. The application before me is a Notice of Motion brought under Order 40 Rules 1, 3 and 4 of Civil Procedure Rules and Sections 3A and 1A of the Civil Procedure Act (cap 21). The application is dated 31/1/2017 and was filed on 1/2/2017. The Applicant – **LAWRENCE OJIAMBO MUGENI** – is the Plaintiff in a suit contemporaneously filed with the application. The Respondent – **FAMILY BANK LTD** – is the Defendant in the same suit.

2. The court first entertained the application Exparte on 2/2/2017 and at that stage, prayers 1 and 2 were dealt with. For consideration at this stage therefore are prayers 3 and 4, which are as follows:

Prayer 3: That pending the hearing and final determination of this suit, there be issued a temporary injunction restraining the Respondent either by itself, agents servants or any other person acting through the Respondent from further advertising for sale by public auction or private treaty the Applicants land parcel No. BUKHAYO/MUNDIKA/3155.

Prayer 4: That costs be provided for.

3. The Applicant's complaint is that the Respondent has caused to be advertised for sale land parcel No. BUKHAYO/MUNDIKA/3155 ("Suit Land" hereafter) before serving him with a statutory notice of sale. The Applicant's position is that if a temporary restraining order is not granted he will suffer irreparable damage and his suit herein will be rendered nugatory.

4. It appears clear that the Applicant and the Respondent entered into a financial arrangement culminating in the Respondent lending 25,000,000/= (Twenty five million shillings) to the Applicant to be repaid on terms and conditions contained in both a letter of offer and a charge document.

5. The Applicant pleaded that he has been servicing the loan but the Respondent nevertheless initiated the process of selling the property offered as security for the loan. That property is the suit land herein. That is why the Applicant wants the Respondent enjoined.

6. The Respondent responded to the application vide a replying affidavit filed on 23/3/2017 and dated 21/3/2017. The Applicant is said to have defaulted in repayment thus provoking commencement of the process of sale. All the requisite notices were said to have been given, with some annexed to the response as LAO-4, LAO-5 and LAO-6. And in a supplementary affidavit filed here on 7/7/2017, a statement of the Applicant's loan account to the Respondent showing his default and indebtedness was availed as LAO-1.

7. The application was canvassed by way of written submissions. The Respondent's submissions were filed on 28/9/2017. The Applicant has not filed submissions.

8. I have read the Respondent's submissions. I have also read the decided authorities availed, which include **SHIMMERS PLAZA LIMITED Vs NATIONAL BANK OF KENYA LIMITED (Civil Application No. NAI 39 of 2012 (UR/2012) NAIROBI, MRAO LIMITED Vs FIRST AMERICA BANK OF KENYA LIMITED & 2 Others: Civil Appeal No. 39 of 2002, NAIROBI, SAMMY JAPHETH KAVUKA Vs EQUITY BANK LIMITED Civil Case No. 84 of 2013, MOMBASA, KLIMANI MOTORS KENYA LIMITED Vs KENYA COMMERCIAL BANK LIMITED Civil Suit No. 171 of 2012, KISUMU and KAAB INVESTMENT LIMITED and Another Vs KENYA COMMERCIAL BANK LIMITED: ELC No. 2 of 2016, MOMBASA.**

9. Contrary to the Applicant's averment that he has been repaying the loan, the statement of account ("LAO-1") availed by the Respondent shows clearly that the Applicant is in default. And the requisite notices, again contrary to Applicant's averments, were sent to the Applicant by registered post using the address he gave at the time of borrowing. There is nothing to show that any of such notices were returned to sender. The inference must be made here that the Applicant received them.

10. Since the Applicant is shown to be in default of payment, the applicable law does not favour a grant of injunctive relief to him. The applicable law is clear and is contained in **HALSBURY LAWS OF ENGLAND, Volume 32, 4th Edition: para 75** and was quoted verbatim by the learned Judges in **MRAO LTD Vs FIRST AMERICAN BANK OF KENYA LTD & 2 Others: Civil Appeal No. 39/2002, MOMBASA**. To paraphrase the quoted law, an injunction will not issue because the amount due is in dispute or because a redemption action has been commenced by the mortgagor. Nor will it issue because the mortgagor object to the manner in which the sale is being arranged. The mortgagor can only get injunctive relief if he pays the money he owes to court or if he demonstrates that the mortgagee's claim is excessive.

11. In this matter too, the Applicant has not demonstrated that he has met the threshold for grant of injunctive relief in accordance with the principles set out in the case of **GIELA Vs CASSMAN BROWN & CO. LTD [1973] EA 358**. And the principles involve establishing a *prima facie* case with a probability of success, demonstrating a likelihood that irreparable harm may result, and considering the balance of convenience where doubts exist as to whether the first two principles have been established.

12. It was a serious omission on the part of the Applicant not to have addressed the issues raised in the Respondent's replying affidavit. It was as serious omission too to fail to file submissions. The Respondent on the other hand was well prepared for the application and availed decided authorities that were helpful in illuminating the way forward.

13. The end result is that the material laid before me by the Respondent demolishes the premise on which the application was brought namely: that the requisite statutory notice of sale was not served and/or that the Applicant has duly been servicing the loan. These averments by the Applicant were shown to be hollow and/or misleading.

14. The upshot is that I find the application herein unmeritorious and dismiss the same with costs to the Respondent.

Dated, signed and delivered at Busia this 14th day of March 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: