



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 23 OF 2017

SOLOMON MAHUGU MURIITHI.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA INDUSTRIAL ESTATES LTD.....DEFENDANT/RESPONDENT

RULING

1. By a plaint dated **14th February 2017** and filed on the same day, the plaintiff herein, Solomon Mahugu Muriithi, hereinafter referred to as “the applicant”, filed the suit herein seeking to permanently restrain the defendant (Kenya Industrial Estates Limited) from selling the parcel of land known as L.R. No. **Tetu/Kiriti/373**, hereinafter referred to as “the suit property”.

2. Simultaneously with the plaint, the applicant filed the notice of motion of even date seeking the following orders:

(i) Certification of the application as urgent and deserving to be heard *ex parte* within the first instance;

(ii) A temporary injunction to restrain the respondent, its agents, servants or auctioneers from selling the suit property (L.R. No. Tetu/Kiriti/373) on 27th February, 2017 or any other date thereafter till the hearing of the application *inter partes*;

(iii) A temporary injunction to restrain the respondent, its agents, servants or auctioneers from selling the suit property (L.R. No. Tetu/Kiriti/373) on 27th February, 2017 till the hearing and determination of the suit.

(iv) Cost of the application be provided for.

3. The application is premised on the grounds that the suit property was scheduled for sale on 27th February, 2017; that there was no reason for the sale because the applicant had repaid the loan advanced to him and that the respondent had refused to furnish the applicant with a statement to enable him understand how the sum of Kshs. 311,972 claimed from him was arrived at, yet according to him, he had repaid the loan of Kshs.750,000/- and the interest upon paying Kshs.954,000/= to the respondent which he believed was the full amount payable by him to the respondent.

4. Maintaining that he has fully met his loan obligations to the respondent, the applicant contends that he stands to suffer irreparable loss if the suit property is sold as advertised.

5. In reply and opposition to the application, the respondent through its Acting Legal Manager **Faith Onyango** *inter alia* deposed that the applicant failed to meet his contractual obligations to the respondent leading to issuance of statutory notices on him of the respondent’s intention to exercise its statutory right of sale of the suit property which had accrued; that the applicant failed to heed the notices making it necessary for the respondent to exercise its right of sale of the suit property.

6. The respondent denies the applicant’s contention that it refused to furnish him with a statement and states that the applicant did not demand any document from it or ask to be supplied with a statement which in any event had been produced.

7. Explaining that due process and diligence was followed in exercising the power of sale, the respondent contends that the applicant has no valid ground for interfering with the sale of the suit property which upon been given as security became a commodity for sale if the applicant defaulted in his obligations to the respondent.

8. According to the respondent, the burden of proving that the full loan had been paid lay with the applicant which burden the applicant had failed to discharge.

9. For the foregoing reasons, the respondent contends that the applicant has not satisfied the conditions for grant of the orders sought.
10. When the application came up for hearing counsel for the applicant, **Mr. Kiminda**, pointed out that the loan advanced to the applicant was Kshs. 750,000/- out of which the applicant had paid Kshs. 964,000/= thus making his case against the respondent not a frivolous one.
11. Counsel for the respondent informed the court that the respondent had filed a similar suit in the lower court which was dismissed and reiterated the respondent's contention that the applicant had not satisfied the conditions for grant of the orders sought.
12. According to the respondent's counsel, the applicant had not established a prima facie case with success at trial; and that he had failed to prove that he would suffer irreparable harm if the orders sought were not granted.
13. Counsel for the respondent further submitted that the balance of convenience in this matter tilts in favour of the respondent because the applicant had filed a similar suit which was dismissed.
14. In a rejoinder, counsel for the applicant submitted that, assuming the balance of the loan indicated in the statement is correct (slightly over 200,000/=) and given the current market value of the suit property (over 3 million), the applicant stands to suffer irreparable harm if the suit property is sold.

The law applicable

15. The law applicable to the application was stated by **Ouko J.**, (as he then was in the case of **Patrick Karimi Wairagu t/a Thigi General Stores vs. Barclays Bank of Kenya Ltd & Another; Nakuru HCCC NO. 93 OF 2011** thus:-

“The onus at this stage, is upon the Applicant to persuade the court that upon the facts he has relied on and on the application of the law, he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour . See Giella V. Cassman Brown & Company Limited (1973) E.A 358.

Starting with the second last principle, the answer was provided by the Court of Appeal in Nyanza Fish Processors Ltd. V Barclays Bank of Kenya Civil Appeal NO. 114 of 2009 where the Judges said;

“If the property, the subject matter of this litigation is sold, the loss to the Applicant will be financial. True, it may be the property is unique. Its value however is ascertainable... The Applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the Applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the Applicant to damages. The Respondent is a bank and there is no gain saying that it will be able to satisfy the loss.”

.....

Turning to the question of *prima facie* case, the question must be determined without going to the merit of the Applicant's suit. The Applicant has in the first place argued that the interest charged was outrageous and unascertainable. The answer to such a claim was provided in the case of Joseph OKoth Wando V National Bank of Kenya Civil Appeal No. 77 of 2004, where the law was stated as follows;

“It is trite law that a court will not

restrain a mortgagee from exercising its power of sale because the amount due is in dispute”

See also Maithya V. Housing Finance Company of Kenya (2003) 1 E.A 133.....

Analysis and determination

16. Whilst on strict application of the law cited above the applicant will not be able to stop the respondent from proceeding with the intended sale of the suit property on account of the dispute concerning the amount due and owing from him to the respondent; given the special circumstances of this case where the applicant has substantially met his obligations to the respondent, the applicant has paid the principal loan and a substantial portion of the interests and other attendant charges; I am of the considered view that the applicant will be greatly prejudiced if the respondent is allowed to proceed with the intended sale before the dispute herein is resolved. That been my view of the dispute herein, in exercise of the powers vested on me under **Section 104(4)** of the Land Act, 2012 I decline to allow the respondent to proceed with the intended sale before the hearing and conclusion of this suit.

17. **Section 104(4)** of the Land Act aforementioned provides as follows:-

“A court may refuse to authorise an order or may grant any relief against operation of a remedy that the circumstances of the case may require...”

18. The upshot of the foregoing is that the application is allowed in terms of prayer (iii).

19. Costs of the application shall abide the outcome of the suit.

Dated, Signed and Delivered at Nyeri this 19th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Kiminda for the plaintiff/applicant

Ms Macharia h/b for Mr. Mulando for the defendants

Court assistant - Esther