



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO

ELC CASE NO 772 OF 2017

(Formerly Nairobi ELC 1634 of 2016)

ALKARIM BADRUDIN SUNDERJI.....PLAINTIFF

VERSUS

VISPIS WHOLESALERS LIMITED.....1ST DEFENDANT

KEVAL KUMAR NAVIN MAISURIA.....2ND DEFENDANT

CFC STANBIC BANK OF KENYA.....3RD DEFENDANT

RULING

The applications for determination are Plaintiff's Notices of Motion dated the 9th December, 2016 and 6th September, 2017 respectively brought pursuant to Order 40 rules 1, 4 & 10, Order 51 Rule 1 and Section 3A of the Civil Procedure Act as well as all the other enabling provisions of the law. The two applications are based on the following grounds, which in summary is that the Plaintiff is the registered owner of land parcel numbers KAJIADO/KAPUTIEI NORTH/ 19764 and KAJIADO/KAPUTIEI NORTH/ 19765 hereinafter referred to as the 'suit lands'. The 1st Defendant fraudulently charged the suit lands as security to obtain financial facility from the 3rd Defendant. The 1st Defendant defaulted in regularizing the said loan facility and is listed with the Credit Reference Bureau. The 3rd Defendant wishes to exercise its statutory power of sale over the suit lands and unless the orders sought are granted it will extremely prejudice the Plaintiff.

The application is supported by the affidavit of AL KARIM BADRUDIN SUNDERJI the Plaintiff herein where he deposes that he surrendered to the 2nd Defendant two original title deeds of the suit lands for his due diligence and future consideration for their sale. He claims that without his knowledge, the 2nd Defendant forged his signature and proceeded to charge the suit lands in favour of the 3rd Defendant for a financial facility of Kshs. 14 million. Further, after having knowledge of the acts of the 2nd Defendant, he entered into an agreement with him on 10th March, 2015 whereby the 2nd Defendant acknowledged forging his signature on the charge documents and agreed he would return the original title deeds free of any encumbrances as well as pay the sum of Kshs. 4 million as compensation for loss of user of the suit lands, but he did not do so. He is apprehensive that the 3rd Defendant intends to exercise its statutory power of sale over the suit lands and has instructed messrs Dalali Traders Auctioneers to effect the sale by way of public auction on 18th January, 2017. Further that despite demanding for his two title deeds from the 2nd Defendant, he has failed to adhere to the terms of their agreement and instead sought for six months extension from his advocates, before doing so.

The application is opposed by the 2nd Defendant who filed a replying affidavit sworn by KEVAL KUMAR NAVIN MAISURIA where he deposed that the Plaintiff as the Chargor offered the suit lands and availed the same to the 1st Defendant who was the borrower as security for a facility of Kshs. 14 million extended by the 3rd Defendant vide a Letter of Offer dated the 21st November, 2013. Further, that a Charge was registered over the suit lands on 28th January, 2014 and the loan was disbursed to the 1st Defendant. He insists the Plaintiff did not raise the issue of his properties being charged without his knowledge and in an attempt to frustrate the 1st and 2nd Defendant's efforts from servicing the loan, coerced the 2nd Defendant in the presence of the Plaintiff's wife and compelled him to buy the Charged land. Further that this made the 1st Defendant not able to regularize the loan. The 2nd Defendant denies the allegations of fraud and insists the Plaintiff and his wife executed the Charge Instrument. He reiterates that the 1st Defendant is ready and willing to repay the loan.

The 3rd Defendant also opposed the application and filed a replying affidavit ANNE KASWII MULI the Business Solutions and Recoveries in its Credit Department where she deposed that the Plaintiff's wife Shamira Al Karim Sunderji gave a written consent to have the charge created on 21st November, 2013 and annexed a copy of the consent as annexure 'AM1'. She contended that the Plaintiff further executed a guarantee, in favour of the 3rd Defendant, to secure the advances the bank made to the Plaintiff. Further that the guarantee was together with

the charge, securities that were provided for advances that were made to the 1st Defendant. She insists the Plaintiff was duly served with all the statutory notices required prior to the sale of the suit land and he never raised any objection. She reiterates that there is no dispute the 3rd Defendant is owed and that he has taken all the steps to realize its security over the charged properties.

The 3rd Defendant further filed a replying affidavit sworn by ESTHER WANJIRU KIMANI advocate who confirmed that the Plaintiff appeared before her on the 28th January, 2014 and signed the Charge. She contends that she duly witnessed and retained a copy of his identity card for her records.

The Plaintiff filed three supplementary affidavits where he reiterated his claim and denied that the wife gave spousal consent to Charge the suit lands. He deposed that on 9th April, 2013, he instructed one Mr. Pabbaraju Sridhar to sell the suit lands and the said Mr. Sridhar was acting as an agent on his behalf as he resides in Kampala. He avers that Mr. Sridhar found a buyer for the suit lands who is the 2nd Defendant herein, who showed an interest but did not have enough money to purchase them but confirmed he was borrowing money from the 3rd Defendant so as to do so. He confirms Mr. Sridhar brought the term loan letter dated the 21st November, 2013 with the guarantee and indemnity which he signed in Kampala but not before Esther Wanjiru Kimani Advocate. Further, that he handed over his original title deeds in respect of the suit lands to Mr. Sridhar which Mr. Sridhar handed over to the 2nd Defendant. He insists the 2nd Defendant deceived him and registered a Charge over the suit lands He further states that the 2nd Defendant forged his signature. He denies appearing before Esther Wanjiru Kimani advocate to execute the Charge dated the 28th January, 2014 in favour of the 3rd Defendant with respect to the suit lands. He admits that he executed the Guarantee and the term loan facility letter dated the 21st November, 2013 for processing of the loan. He however, states that he is a stranger to the letter of amendment on page 13 dated the 21st November, 2013 and term loan letter on page 19 dated 7th March, 2016 annexed to the 3rd Defendant's replying affidavit. He contends that he did not receive the statutory notices indicated on pages 35, 38, 40, 42 and 43 on exhibits 'AM 1' of the 3rd Defendant's replying affidavit as the address indicated therein ceased to exist. Further, that he did not receive a call from one George on 28th January, 2016 informing him of any service from Simon M. Mbinda and did not instruct the said George to accept service.

The parties filed their submissions that I have considered

Analysis and Determination

Upon perusal of the Plaintiff's Notices of Motion dated the 9th December, 2016 and 6th September, 2017 respectively including the supporting, replying and further affidavits, as well as the annexures thereon plus the submissions, I find that the only issue in contention at this juncture is whether the Plaintiff is entitled to interim injunction pending the outcome of the suit.

The Plaintiff contends that there was no spousal consent executed by his wife before the Charge was effected. He claims the 2nd Defendant fraudulently forged his signature and charged the suit lands with the 3rd Defendant. The 2nd Defendant insists the Plaintiff guaranteed the loan the 1st Defendant took from the 3rd Defendant and offered the suit lands as security. It is not denied that the 1st Defendant has defaulted in repaying the loan culminating in the 3rd Defendant seeking to exercise its statutory power of sale. The Plaintiff has relied on the following cases to support his claim: **Mrao Vs First American Bank Ltd (2003) KLR 125; Albert Mario Corderio & Another V Vishram Shamji (2015) eKLR; Hassan Zubedi V Patrick Mwangangi Kibaiya & Another (2014) eKLR; Joseph Siro Mosiamo V Housing Finance Company of Kenya; and Joseph Mbugua Gichanga Vs Cooperative of Kenya Ltd (2015) eKLR to support his claim.** While the 3rd Defendant relied on the cases of **Giella Vs Cassman Brown (1973) EA 358, Mrao Vs First American Bank Ltd (2003) KLR 125, Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others (2014) eKLR; and Andrew Wanjohi Vs Equity Building Society & 7 others (2006) eKLR** to oppose the Plaintiff's application for injunction.

In the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** the Court established the principles of granting an injunction 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."

As to whether the Plaintiff has established a prima facie case with a probability of success, I note the Plaintiff executed the Charge document while the wife granted a spousal consent. The Plaintiff however alleges that his signature was forged. He denies that the wife did not grant spousal consent and that he was not served with the requisite statutory notices before the suit lands were advertised for sale since the address where the said notices were sent to, is no longer in use.

Section 79(3) of the Land Act provides that **'A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.'**

In the current scenario, I find that the Plaintiff's wife indeed signed the spousal consent as evidenced in exhibit 'AM 1' and no evidence has been presented from a handwriting expert to challenge the said signature. I note the Plaintiff was indeed served with a Notice dated the 8th June, 2015; and another notice dated 23rd November, 2015. Further, a Court Process Server delivered the Notice dated the 23rd November, 2015 to the Plaintiff's Residence on 26th November, 2015. A Notification of Sale by Dalali Auctioneers dated the 15th October, 2015 was also served to the Plaintiff. I note the 3rd Defendant annexed Certificates of Posting that are not controverted by the Plaintiff. The Plaintiff however contends that the post box is no longer in use. I note that it was the duty of the Plaintiff as the Chargor to inform the 3rd Defendant of any change of address if any, as the Chargee was legally bound, in case of default to send the requisite notices to the Chargor's last known postal address. The 2nd Defendant has also admitted that the 1st Defendant is indeed in default of the loan repayment. From the foregoing, I

find that the 3rd Defendant's power of sale as the Chargee had indeed crystallized.

In the case of Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125 the court held that: ' In civil cases, a prima facie is a case in 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'

In relying on this case and the facts as presented, I find that the Plaintiff has not established a prima facie case to warrant the grant of an injunction pending the outcome of the suit.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the suit lands have been sold to the 2nd Defendant as per the agreement annexed to the supporting affidavit. Further that the said suit lands are charged to the 3rd Defendant. The Plaintiff admitted signing the Letter of Offer and the 3rd Defendant confirmed that the Plaintiff indeed appeared before their advocate to execute the Charge document and deed of guarantee. In the case of **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 as he signed the Charge and Guarantee documents to charge the suit lands. Further that once he charged the suit lands, they became a security, which could be sold by the 3rd Defendant in case of default.

On the question of balance of convenience, I note the Plaintiff is claiming fraud but I note in the agreement with the 2nd Defendant, there existed a relationship where he admitted signing various documents from the bank relating to the loan advanced to the 1st Defendant by the 3rd Defendant. 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 case, and facts as presented, I find the balance tilts in favour of the 3rd Defendant whose statutory power of sale has crystallized as the Plaintiff charged the suit lands to secure a loan advanced to the 1st Defendant which has since defaulted in repaying it.

It is against the foregoing that I find the Plaintiff's Notices of Motion dated the 6th September, 2017 and 9th December, 2016 respectively unmerited and dismiss them with costs.

Dated signed and delivered in open court at Kajiado this 10th day of April, 2018

CHRISTINE OCHIENG

JUDGE