



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 105 OF 2017

COSMAS STEPHEN NABUNGOLO.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LIMITED...DEFENDANT

R U L I N G

1. The application dated 13/6/2017 seeks an order of temporary injunction to restrain the defendant from advertising or selling the plaintiff's properties listed in the statutory notice dated 22/11/2016 pending the hearing and final determination of this suit. It also seeks orders restraining the defendant from charging any further interest on the plaintiff's loan account at ABC Bank Kitale Branch pending the hearing and determination of this suit and an order for the taking of account, directing the defendant to supply the plaintiff and this court with a full statement of account showing all dealings, interest and penalties charged on the plaintiff's said account. Finally the application seeks an order directing the defendant to give details of its interest rates approval by the Central Bank of Kenya from the year 2015 to date.
2. The plaintiff's supporting affidavit is dated 13/6/2017 and is annexed thereto. The background to the application is that the plaintiff took out a credit facility with the defendant Bank for agricultural business, but adverse weather compelled him to request, which request was accepted by the defendant, for a restructuring of the loan repayment. The plaintiff now alleges that the defendant has turned its back on that restructuring arrangement and, despite having serviced his loan, he has been served a "backdated" statutory notice under the Land Act 2012 requiring him to pay in full the loan sums at once within 40 days in default of which his property would be sold to realise the sum of Kshs.113,470,783.28/= which sum he alleges to be inflated with illegal interest and penalties not approved by the Regulator.
3. The plaintiff claims the Bank has failed to furnish him with periodic loan account statements, has charged illegal interest of upto 36%, and levied illegal penalties, erroneously computed interest, and failed to give him a copy of the loan agreement and other crucial documents. It's alleged that the defendant has also listed in the statutory notice properties which the plaintiff did not charge to it for the loan.
4. The defendant opposes the application. It filed the replying affidavit sworn by Kajuju Marete, its Senior Legal Officer on 19/7/2017. The gist of the defendant's reply is that the plaintiff has been a "dutiful defaulter" who, having accepted terms of letters of offer and executed charge documents in respect of eleven properties registered in his name, most of which he offered for charging twice, the plaintiff has subsequently defaulted in repayment of the loan moneys, with some of the arrears dating back to the year 2014.
5. In the defendant's view the plaintiff is guilty of material non-disclosure by revealing only one loan account whereas he has five accounts, all of which he has not been servicing and so orders should be refused. Further, the defendant denies charging illegal interest, penalties, commissions, bank charges, legal and other costs and expenses or doing so contrary to the letters of offer and the charge documents which were the contractual documents.
6. The deponent avers that the defendant properly served the statutory notices upon the plaintiff and gave the plaintiff a 3 month notice from the date of service of the statutory notice as required by **Section 90 (3) of the Land Act**.
7. In the defendant's view the plaintiff has not demonstrated that he has a prima facie case with any probability of success or that any loss he may suffer cannot be compensated for by way of damages. The defendant avers that the balance of convenience tilts in favour of the defendant as the moneys that the plaintiff owes are depositor's funds which the Bank should safeguard. Besides, any further delay may ultimately inflate the debt and render the securities insufficient to meet the increasing redemption sum. Despite intimation of an intention to file a further or a supplementary affidavit to counter the defendant's reply, the plaintiff never did so. Parties filed their submissions on 13/3/2018 (defendant) and 19/3/2018 (plaintiff).
8. Before I delve further into this matter it is important to note that by a written consent signed by the two parties herein dated 27/6/2017 which was received in court on the same day and subsequently recorded by the court on 20/7/2017, the interim orders first granted in this matter on 19/6/2017 on the instant notice of motion were extended until the hearing and determination of the application.

9. The vital issues in this application are as follows:-

-1 Is the plaintiff guilty of material non-disclosure?

-2 Has the plaintiff demonstrated a prima facie case?

-3 Would the plaintiff suffer loss or injury for which an award of compensation would not be adequate?

(1) Is the plaintiff guilty of material non-disclosure?

10. On the issue of the non-disclosure of four loan accounts, this court finds that the plaintiff annexed *Exhibit "CN3"* to his affidavit in support of the notice of motion, which lists four loan accounts. However in his notice of motion and supporting affidavit he addresses only the issue of Account No. 00521501000717. This is the only account reflected in the pay-in slips marked as *Exhibit "CN1 (i)-(iv)"*. On a cursory glance one would be forgiven to believe that that account is the only account the plaintiff had with the defendant Bank as the plaintiff is totally silent on the issue of all the other accounts. He has not uttered a word on whether he has been repaying any monies in respect of those accounts or not, notwithstanding that there was an aggregate legal charge dated 6/3/2014 and registered on 7/4/2014 for the sum of Kshs.76,000,000/= over eight properties registered in his name. If the overdraft facility granted by the defendant in respect of the only account the plaintiff speaks of was just Kshs.10,000,000/= one can see that by failing to account for the balance of the loans being approximately Kshs.66,000,000/= which other accounts bore, the plaintiff was clearly guilty of material non-disclosure. That non-disclosure was meant to deceive the court into believing that there were no other accounts and that the plaintiff having annexed pay-in slips, crediting that account with funds, during the pendency of the loans, with the most recent payment being made on 13/3/2017.

11. I have however noted the candour on the defendant's part as it has disclosed most of the payments made on that account upto 1/1/2017 at paragraph 9(e) of the replying affidavit. However, I still note that the amount reflected in the pay-in slips for the period February to March, 2017 is puny compared with the balance outstanding of Kshs.11,618,457.50/= on that account.

12. For these reasons I find that the plaintiff is guilty of material non-disclosure. Bearing in mind that this is a matter involving colossal sums of money and possible disposal of valuable land, I will not stop there; I will proceed to examine the other issues involved.

(2) Has the plaintiff demonstrated that he has a prima facie case?

13. First, I find the plaintiff's affidavit evidence in support of the motion to be extremely deficient in that though allegations are that the loan funds were meant for an agricultural business, not a shred of evidence testifies to that. Such evidence would have accorded well with the claim that changed climatic conditions made his farming venture to fail thus leading to the default. The plaintiff's list of documents dated 13/6/2017 filed with the court fares no better on this issue. So where can this court begin in assessing the plaintiff's grounds in paragraph 4 of the supporting affidavit - that there were weather vagaries and climate challenges in Trans-Nzoia that threatened farming ventures? No business accounts are exhibited at all. I find the plaintiff to be evasive of that issue.

14. On the issue of whether the defendant has included in the statutory notice some properties which were not charged to it, the plaintiff has utterly failed to distinguish between the charged and the uncharged properties. The burden of proof being on the allegor, and it not having been discharged, I am constrained to rely on the evidence of the defendant alone, which indicates that all the land parcels mentioned in the notice dated 27/2/2017 were charged to it. The rule of evidence is that he who alleges proves and in annexure 2 to the letters of offer dated 11/9/2013, I find that all the eleven properties were earmarked as potential securities. The same happens in annexure 2 of the letter of offer dated 20/5/2014 and also in the letter of offer dated 13/3/2015. Looking at the documents of charge, further charge and supplemental charge exhibited by the defendant, I find that all the premises pledged as security and which are the subject of the notice dated 27/2/2017 are covered by either one or more of those documents and the plaintiff's claim is therefore not correct.

15. Regarding the allegation that there is a dispute as to the amounts due, this has never formed a good ground for granting of an injunction and the remedy, in the event that the properties are disposed of in realization of security, is a claim for damages against the chargee. The case of *Mugambi -vs- Housing Finance Company of Kenya Ltd 2006 eKLR* has already been cited by the defendant in this regard. In that case the court stated as follows:-

"From the foregoing it is abundantly clear that the plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems as unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the plaintiff to make any presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it is only when the court makes an adjudication of the issues that the borrower would know whether or not his beliefs had gained judicial recognition"

16. I therefore find that the plaintiff has not establish that he has a prima facie case with a probability of success.

(3) Whether the plaintiff is likely to suffer injury that cannot be compensated by way of damages

17. The defendant has relied on the case of *Kihara -vs- Barclays Bank (K) Ltd [2001]EA (2) EA at P. 42*, where the court stated as follows:-

"As the plaintiff had put up the property as security for the loan with full knowledge that should he default it would be sold he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages. The forced sale value of the property was Kshs.1.5 million, an amount well within the means of the defendant. Even if the defendant had shown that he had a prima facie case with a probability of success, the application would still fail on the merits as he

had not satisfied that court that if the sale proceeded he would suffer irreparable injury which could not be compensated by an award of damages”.

18. I have already stated that in the event that the sale is found to have been wrongful the plaintiff would be entitled to a remedy against the chargee in damages. As can be seen from the evidence of the Senior Legal Officer of the defendant, the amount needed to redeem the properties is increasing quite fast. By the time the plaintiff was lodging his application he expressed it to be estimated at Kshs.113,470,783.28/= as at 23/2/2017. In her affidavit the defendant’s Senior Legal Officer sworn on 19/7/2017 the amount had already shot to Kshs.121,820,559.41/=. As the plaintiff has not demonstrated that this is not the rate of increase and has not demonstrated that he has kept up with the payments sufficiently to stave off a further exponential increase, I am inclined to believe that the position held by the defendant, that any further delay in realizing the securities will only cut away at their ability if disposed of, to eventually satisfy the ultimate sum payable to be of some truth.

19. I would not therefore consider that the plaintiff has established that he would suffer irreparable injury. By the same set of facts and arguments I find that the balance of convenience lies in denying the orders sought. I therefore find that the plaintiff’s notice of motion dated **13/6/2017** has no merits. The existing orders of injunction are hereby vacated and the said application is dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this **29th** day of **May, 2018**.

MWANGI NJOROGE

JUDGE

29/05/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Applicants

N/A for the Respondents

COURT

Ruling read in open court in the absence of parties who had been notified.

MWANGI NJOROGE

JUDGE

29/05/2018