



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 340 OF 2016

HESHIMART ENTERPRISES.....PLAINTIFF

VERSUS

RAFIKI MICROFINANCE BANK LIMITED.....1ST DEFENDANT

IMMEDIATE AUCTIONEERS.....2ND DEFENDANT

RULING

The plaintiff has come to court for a temporary order of injunction restraining the defendants either acting by themselves, servants and or agents from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring and or otherwise disposing off the whole of that parcel of land known as Sergoit/Koiwaptai Block 11/371 pending the hearing and determination of this application interpartes and the main suit. In the alternative to prayer (b) above, the time for compliance and/or for rectifying any default to redeem that parcel of land known as Sergoit/Koiwaptai Block 11/371 be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under Section 104(2) as read with Section 90 of the Land Act, 2012. In the alternative to prayer (b) and (c) above, the defendant/respondent's statutory power of sale be suspended and/or postponed for a period of 24 months or for such other period as the court may determine to enable the plaintiff/applicant redeem that parcel of land known as Sergoit/Koiwaptai Block 11/371. Costs of this application be provided for.

The application is based on grounds that the plaintiff is the registered owner of land parcel number Sergoit/Koiwaptai Block 11/371. The plaintiff guaranteed a loan advanced to one Robert Karanja Mwaura t/a Smarty Enterprises by the 1st defendant and charged the land parcel Sergoit/Koiwaptai Block 11/371. The principal borrower defaulted in his monthly payments and the defendant advertised the plaintiff's property for sale by public auction to be held on 29.11.2016. The 1st defendant has not issued a statutory notice under Section 96(2) of the Land Act, 2012. The plaintiff is ready and willing to offset the debt and it intends to sell another property for the same. The plaintiff has a prima facie case with probability of success and will suffer irreparable loss and damage unless an order of injunction is issued. That the balance of convenience tilts in favour of the plaintiff. That damages shall be an adequate remedy.

In the supporting affidavit, the plaintiff states that the 1st defendant advanced a loan to Robert Karanja Mwaura t/a Smarty Enterprises. The plaintiff herein guaranteed the said loan and as a collateral charged the land parcel known as Segoit/Koiwaptai Block 11/371. He has been assuming all is well between the 1st defendant and the principal debtor. That however, on 6.6.2016, he received a letter from M/s Mckay Advocates indicating that his land would be sold due to the default of the principal borrower. On 16.9.2016, he wrote a letter to the 1st defendant explaining that he was going through financial constraints and committing to repay the loan including the arrears by disposing off his property known as Uasin Gishu, Kimumu Scheme 1695.

He has made payment of Kshs. 50,000 and Kshs. 10,000 towards the repayment of the loan on 10.10.2016 and 1.11.2016 respectively as he endeavour to look for a buyer for the above-named property for purposes of clearing the loan. To his utter shock, he learnt that the 1st defendant is in the process of carrying out the charge statutory power of sale.

According to the applicant, the sale of the land is improper for the reasons that no statutory notice of sale was issued to the plaintiff pursuant to Section 96(2) of the Land Act, 2012. The advertisement of the property was made before the end of the statutory period for redemption. The amount required to remedy the default is not stated. No valuation of the property has been carried out. The equity of redemption is being clogged. The defendants have not exhausted alternative remedies available before resorting to sale of the collateral. He is ready and willing to pay the loan but he requires more time and the indulgence of the 1st defendant.

The chargee ought to have exercised another remedy before resorting to the power of sale. That based on the above reasons, he has a prima facie case with a high probability of success and that he will suffer irreparable damage should the suit parcel of land be sold by public auction. That he therefore prays that this application be allowed.

Hillary Rono, the Credit Manager of the 1st respondent states that the plaintiff herein guaranteed a loan of Kshs.7,000,000 granted to one

Robert Karanja and payable by 36 equal monthly instalments of Kshs.263,726. The principal debtor breached the terms of the loan agreement by failing to pay the instalments on their due dates. That as a result of the aforesaid default, the defendant's statutory power of sale crystallized and that all statutory notices were issued and duly copied to the plaintiff. The principal debtor admitted that the plaintiff is liable to repay the loan.

The plaintiff is guilty of inequitable conduct by failing to pay the loan and therefore undeserving of the equitable remedy of injunction. The plaintiff's further affidavit intimates that there was collusion between the 1st defendant and the borrower.

The gist of the plaintiff's submissions is that he has established a prima facie case with a likelihood of success and that if injunction is not given, he will suffer irreparable loss and that the balance of convenience tilts towards granting the order. Moreover, that the court should look at the overriding objective of the law to do justice.

The defendant on his part argues that the applicant has not demonstrated a prima facie case with a likelihood of success and that he has not demonstrated that he is likely to suffer irreparable injury which would not be compensated by and of damages.

I have considered the application and the replying affidavit and I do find that the applicant has demonstrated a prima facie case with a likelihood of success on the following grounds;

- 1. There was no valuation report contrary to section 97(2) of the Land Act.**
- 2. The charge document is not sealed by the company seal.**
- 3. The plaintiff was served with the notice to exercise statutory power of sale.**
- 4. There are no resolutions that the company guarantees the loan.**

From the foregoing, I do find that the above issues can go for trial.

On the issue of irreparable harm, I do find that the plaintiff has not demonstrated in the affidavit or submissions the kind of irreparable harm he is likely to suffer. The plaintiff should not only state that he will suffer irreparable harm but should demonstrate by evidence that he will suffer irreparable harm. However, on balance of convenience, I do find that it tilts towards maintaining status quo as the plaintiff will be more inconvenienced if the property is sold without valuation.

Dated and delivered at Eldoret this 11th day of May, 2018.

A. OMBWAYO

JUDGE