REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 90 OF 2017

KENNEDY MUCHILWA.....PLAINTIFF/APPLICANT

VERSUS

CHARLES PETERSON OGWOK...1ST DEFENDANT/RESPONDENT

SPEED CAPITAL LIMITED.....2ND DEFENDANT/RESPONDENT

CLEVERLINE AUTIONEERS.....3RD DEFENDANT/RESPONDENT

RULING

The plaintiff has come to court seeking for an order of temporary injunction restraining the defendants, its officers, servants and or agents from the sale through auctioning or private treaty of land parcel No. Eldoret Municipality Block 21 (Kingong'o)/4540. The application is supported by the plaintiff's affidavit sworn on 2.3.2017. The plaintiff states that the plaintiff/applicant is the registered owner of the said parcel of land known as Title Number Eldoret Municipality Block 21 (Kingong'o)/4540. The 1st respondent acquired a loan from speed capital limited, the 2nd respondent of Kshs.1,500,000 with the applicant being the guarantor to the loan.

That a charge was registered against the applicant's title deed for parcel No. Eldoret Municipality Block 21 (Kingong'o)/4540.

The 1st respondent subsequently defaulted in repaying the loan a fact that the applicant was never aware of until he received a demand letter dated 27th May, 2016 from the chargor, the 2nd respondent. That as a result of default by the 1st respondent, the 2nd respondent instructed the 3rd respondent to sell the said parcel No. Eldoret Municipality Block 21 (Kingong'o)/4540 belonging to the applicant.

The 3rd respondent has since issued a 45 days redemption notice over the applicant's parcel dated 14th December, 2016 and a notification of sale dated 14th December, 2016. The applicant has in vain tried to contact the respondents in order to address the issues with the 1st respondent being untraceable to date.

The 1st respondent willingly defaulted in repaying the loan and he has since disappeared and is untraceable and despite the applicant's efforts to reach both the 1st and 2nd respondent, the efforts have been futile necessitating the filing of this suit.

That it is the applicant's prayer that he be granted temporary orders restraining the 2nd and 3rd respondents from selling the parcel of land until the hearing the determination of the main suit.

The subject matter herein is a parcel of land belonging to the applicant and if the 2nd and 3rd respondents proceed with the sale, the applicant will suffer irreparably. The applicant needs time to raise the loan amount being owed to the 2nd respondent thus, the temporary orders being sought.

That as such, it is in the best interest of justice that the intended sale be put on hold to enable the applicant raise the loan amount. The application is made in good faith and in the best interests of justice.

The 2nd defendant states that as admitted by the plaintiff, the 1st defendant approached the 2nd defendant for a loan facility of Kshs.1.5 million and which loan was approved upon satisfactory evaluation. The plaintiff agreed to guarantee the 1st defendant and offered his property title No. Eldoret Municipality Block 21 (Kingong'o)/4540 and the same was duly charged in favour of the 2nd defendant as vividly admitted by the plaintiff.

The 1st defendant did not make any repayments at all and that he is aware that his officers did on several occasions contact the plaintiff guarantor and the 1st defendant on phone and reminded them of their obligation to settle the loan amounts and interests but they did not settle.

That upon continued default, on 27th May, 2016, they issued the statutory notice as required by the law giving the borrower (1st defendant) and guarantor (plaintiff) notice of three months that they would proceed to sell the property if they did not repay the amounts outstanding and which notice the plaintiff has acknowledged receiving.

That upon expiry of the said three months, on 8th September, 2016 they issued another notice again of 40 days as required by the law advising the plaintiff and the borrower that they would sell the property if the account was not redeemed and the same were duly served and acknowledged.

The plaintiff and the borrower did not do anything and the auctioneer duly issued a statutory notice and served the same upon the plaintiff and the borrower at their residence giving him 45 days to redeem his property which notice the plaintiff has duly acknowledged.

That the recovery process was legal and above board totally and that clearly the plaintiff has been aware of the recovery process and cannot feign ignorance at this level close to a year since the process of recovery started.

The respondent states that he is advised by his advocates on record of which information he verily believes to be true that the principle of equity demands that one who seeks equity must do equity, it is in the interest of justice that the 2nd defendant should be allowed to proceed with the recovery. That he is also advised further by their advocates which advise he believes to be true that the application is bad in law, incurably defective and a gross abuse of the court process. The application is mala fides and grossly lacking in merit as it does not show any cause of action against the 2nd defendant. The application is deliberately meant to derail the recovery process and the same is inequitable and should be disallowed.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles:-

1) whether the applicant has demonstrated a prima facie case with a probability of success.

2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.

3) Where the balance of convenience tilts if the court is in doubt.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. ***Prima Facie*** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a ***Prima Facie*** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that ***irreparable injury*** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

The court should issue an injunction where the ***balance of convenience*** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of ***balance of convenience*** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed.

Although it is called balance of convenience it is really the ***balance of inconvenience*** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

I have considered the application, replying affidavit and do find that the plaintiff's complaint that he was not notified of the default by the 1st defendant is not true as the letter dated 27.5.2016 is sufficient notice. Moreover, the plaintiff knew the consequences guaranteeing the loan. Failure to reach the 1st defendant whom he guaranteed the loan cannot be visited on the 2nd defendant.

I do find that the plaintiff guaranteed 1st defendant the loan and the 1st defendant has defaulted and disappeared. The relevant notices were issued by the 2nd defendant. The plaintiff has not demonstrated a prima facie case with a likelihood of success. Moreover, the plaintiff has not demonstrated that he is likely to suffer irreparable harm as the 2nd defendant can compensate the plaintiff if successful. If this matter was to be decided on balance of convenience, it would tilt towards dismissing the application as the 2nd defendant would suffer greater inconvenience as the 1st defendant has taken the loan after being guaranteed by the plaintiff and disappeared. If the plaintiff was to be granted the injunction, the 2nd defendant would lose the money and the land. The application is dismissed with costs.

Dated and delivered at Eldoret this 29th day of June, 2018.

A. OMBWAYO

JUDGE