



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 24 OF 2017**

**HILLARY KIPKOSGEI KIBOINNET**

**T/A SWEETLAND LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHASE BANK (KENYA) LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COLINET AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

***Hillary Kipkosgei Kiboinnet T/a Sweetland Limited*** has come to court against Chase Bank Limited and Colinet Auctioneers praying for a temporary injunction restraining the defendants, their servants and/or agents from trespassing into, entering upon, subdividing, selling, transferring, leasing and or otherwise dealing with land parcel No. L. R. No. ELDORET MUNICIPALITY/BLOCK 12/342, pending the hearing and determination of the suit. The grounds of the application are that the plaintiff has been residing, occupying and in possession of the land parcel known as L. R. No. Eldoret Municipality/Block 12/342. The 1<sup>st</sup> defendant offered credit facility and charged land parcel L. R. No. Eldoret Municipality/Block 12/342 belonging to the plaintiff for repayment at an interest rate of 18%. The plaintiff took up the loan for business expansion since he deals with buying and selling of lands. The defendants have advertised the suit property for sale by public auction. The plaintiff has to date been duly the loan faithfully as required. The loan advanced was a business loan under the business clientele loan. That no statutory notice was issued. The plaintiff has over and over requested the 1<sup>st</sup> respondent to reconsider its inordinately high increased interest in vain. No demand has ever been issued prior to the publication of 5<sup>th</sup> January, 2017. No valid notices were served on the plaintiff. Prior to the advertisement, the plaintiff has carried out major developments on the suit land. The suit raises fundamental issues with a high probability of success. The amount so far repaid is over Kshs.6,000,000 only what was advanced was Kshs. 12,000,000 and yet the loan period has not yet lapsed. The advertisement notice is too short. The value of the property in question is over Kshs. 40,000,000. No amount of damages can compensate the plaintiff in the event that the suit land is sold.

The application is supported by the affidavit of Hillary Kipkosgei Kiboinnet. The plaintiff claims to be paying the loan instalments however, the defendant has intention of selling the property. The land is valued at Kshs. 40,000,000 and yet the balance of the loan is Kshs. 6,000,000. The plaintiff is committed to paying the loan.

In the replying affidavit sworn by Kevin Kimani, the 1<sup>st</sup> respondent states that the plaintiff was advanced Kshs. 12,000,000 and properties No. 12/342 and 1057 were charged to secure the loan. The plaintiff defaulted in paying the loan and therefore, the facility ran into arrears and the outstanding amount is Kshs.11,315,477.25. The plaintiff was given notice but failed or refused to pay. The demand letter requesting him to pay was issued. Statutory notice was issued but no money has been paid.

At the expiry of the period provided in the statutory notice, the 1<sup>st</sup> defendant issued notice to sell but no response was forthcoming. A valuation report was prepared pursuant to the provision of section 97(2) of the Land Act. A redemption notice was issued and the 1<sup>st</sup> defendant instructed the auctioneers to proclaim the property on 9.11.2016 and the property was advertised for sale by public auction on 25.1.2017. The applicant did not file a supplementary affidavit with submissions as ordered by the court on 25.7.2017 and therefore, the defendant also did not file submissions. Applications of this nature are decided on the principles set down by ***GIELLA -V-CASSMAN BROWN & CO. LTD 1973] E.A. 358 for the grant of an interlocutory injunction.***

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.

In this matter, I do find that the plaintiff's address is P. O. Box 7934 – 30100, Eldoret. It is not in dispute that the plaintiff took a loan facility of Kshs.12,000,000. It is also not in dispute that the plaintiff was in arrears. On the 2.11.2015, a demand notice was served upon the plaintiff on the address provided by the plaintiff. There is evidence of postage by the Postal Corporation of Kenya. On the 18.2.2016, the notice to exercise the statutory power of sale over charger in respect of title No. Eldoret Municipality/Block 12/342 and Kaptagat/Kakptagat Block 1/ (Uasin Gishu)/1057 was issued. The plaintiff was given 90 days as required by law. The plaintiff was given an opportunity to redeem the property within 40 days vide the letter dated 8.6.2016.

On the 9.11.2016, the defendants initiated Crystal Valuers to value the property and it was so valued and a report was prepared by the Crystal Valuers Limited.

I do find that the defendants followed due process in realizing the charged property. The plaintiff has therefore, not established a prima facie case with a probability of success. No irreparable harm has been demonstrated as the defendants are capable of paying the plaintiff's damages. Moreover, the charged property became a commodity liable for sale and therefore, any sentimental value cannot be a reason for this court issuing an injunction.

On balance of convenience, I do find that the defendant is likely to be more inconvenienced as he loaned money to the plaintiff and now the plaintiff has both the money and the land but has defaulted in paying the loan. The defendant has nothing and therefore he is entitled to sell the property to recover the money. The upshot of the above, is that the application is dismissed with costs.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**