



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 181 OF 2017

SIMON GICHOHI MBUTHIA1ST PLAINTIFF

JESSICA NYANZALA LIHANDA2ND PLAINTIFF

VERSUS

LETSHEGO (K) LIMITED1ST DEFENDANT

JOGEDAH AUCTIONEERING SERVICES 2ND DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 3rd May 2017, an application pursuant to which the following orders are sought:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit the honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, employees and or agents from advertising for sale, selling and or disposing all that parcel of land known as Njoro/Ngata Block 1/1649.

4. That costs of this application be borne by the defendants herein.

2. The application is supported by an affidavit sworn by the 1st plaintiff. The 1st plaintiff obtained a loan of Kshs.3, 000, 000/= from the 1st defendant. The loan was secured by a charge over the parcel of land known as Njoro/Ngata Block 1/1649 (the suit property), owned by the 2nd plaintiff. The 1st plaintiff started making repayments but fell into arrears owing to what he claims to be an “overcharge” both in terms of interest and monthly instalments.

3. On 3rd March 2017, the 2nd defendant served the 1st plaintiff with a 45 days redemption notice and a Notification of Sale. He however deposes that the defendants did not serve him with any 90 days’ notice as required under Section 90 (2) of the Land Act and did also not do a valuation of the property as is required by Section 97 (2) of the same Act. He further deposed that he instructed a firm of accountants who upon reviewing and analysing the loan statement advised him that he had been overcharged interest amounting to Kshs.288, 971. According to the 1st plaintiff, he was up to date as at the date he swore the affidavit as far as payments are concerned.

4. The defendants opposed the application through a replying affidavit sworn by Philip Waithinji Mungai, the 1st defendant’s Regional Manager in charge of Nakuru branch. He deposed that the 1st plaintiff defaulted right from the first instalment and that as at 19th May 2017, he had outstanding arrears of Kshs.374, 986.87. As a result, the 1st plaintiff was personally served with a 90 days’ statutory notice on 13th June 2016.

5. The application was heard by way of written submissions. Applicants’ submissions were filed on 7th December 2017 while respondents’ submissions were filed on 22nd February 2018. I have considered the application, the affidavits and submissions filed. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no

consideration.

6. The main plank of the applicant's case is that the statutory notice required by Section 90 (1) of the Land Act was not served. The said section provides:

90. Remedies of a chargee

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

7. The law requires that the notice be served upon the chargor. In this case, the chargor is the 2nd plaintiff. The 1st defendant maintains that the notice was served. In support of this contention the 1st defendant annexed as "PW5" a copy of a notice dated 10th June 2016. A perusal of the notice shows that it is addressed to the 1st plaintiff who is the borrower and not the chargor. The chargor is not copied either.

8. While dealing with a case where service on a chargor was doubtful, the Court of Appeal stated as follows in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR**:

49. In this case, the material before court lends credence to the possibility or likelihood that the procedure might have been flouted. This is because, the statutory notice under Section 90 of the Land Act becomes operational upon service of the same upon the mortgagor and as long as doubt on that aspect persists, then the matter calls for interrogation of the evidence and the same can only be done at trial. In the interim, the same attracts the issuance of injunctive orders and the judge cannot be faulted for holding as much.

9. The right to exercise statutory power of sale only crystalizes if the chargor fails to comply with the statutory notice within 90 days after service thereof. In the absence of evidence of service of a valid statutory notice, the 1st defendant herein cannot proceed with the exercise of statutory power of sale. In the circumstances, I am persuaded that the plaintiffs have established a prima facie case. I do not think damages can adequately compensate them for the loss of land sold pursuant to an irregular exercise of power of sale.

10. The 1st plaintiff admits that he had defaulted. Having received financial facilities from the 1st defendant, he cannot be cushioned indefinitely from the consequences of such default. He has a cardinal obligation to honour the contractual commitment between him and the 1st defendant. For that reason, even though I am persuaded that an injunction ought to issue, I will impose terms to ensure that this court's order is not abused.

11. In the end, I make the following orders:

- a) I grant an injunction restraining the defendants whether by themselves, employees and or agents from advertising for sale, selling or disposing all that parcel of land known as Njoro/Ngata Block 1/1649.
- b) The injunction granted under (a) above shall remain in force for a period of six (6) months from the date of delivery of this ruling.
- c) If the plaintiffs shall default or continue to be in default then the defendants shall be at liberty to issue valid notices and arrange a lawful exercise of a chargee's remedies upon expiry of the six (6) months period.
- d) Costs to the plaintiffs.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Gitau for the plaintiffs/applicants

No appearance for the defendants/respondents

Court Assistant: Gichaba