



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC NO. 372 OF 2017**

**HESHIMART ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA WOMEN MICROFINANCE BANK LTD.....DEFENDANT**

**RULING**

This ruling is in respect of an application dated 20<sup>th</sup> November 2017 brought by way of notice of motion by the plaintiff/applicant seeking for orders:

1. Spent
2. That this Honourable Court be pleased to issue an injunction restraining the defendant whether by itself, its servants and /or agents or otherwise howsoever from the following acts or any of them, that is, from selling, advertising for sale, transferring or any way disposing off or interfering with the plaintiff's occupation and ownership of land parcel number ELDORET MUNICIPALITY/BLOCK 6/251 pending the hearing and determination of this application.
3. That this Honourable Court be pleased to issue an injunction restraining the defendant whether by itself, its servants and /or agents or otherwise howsoever from the following acts or any of them, that is, from selling, advertising for sale, transferring or any way disposing off or interfering with the plaintiff's occupation and ownership of land parcel number ELDORET MUNICIPALITY/BLOCK 6/251 pending the hearing and determination of this suit.
4. That the costs of this application be provided for.

This matter was brought under certificate of urgency by the applicant when the court certified the same as urgent and ordered that the applicant serves the application within 3 days. When the application came up for hearing, interim orders were granted and the parties granted leave to file further affidavits. Parties agreed to canvass the application vide written submissions which were duly filed.

**Plaintiff/Applicant's submissions**

Counsel for the plaintiff gave a brief background to the plaintiff's case and stated that the plaintiff is the registered owner of the suit land known as **ELDORET MUNICIPALITY/BLOCK 6/251** which was charged to the defendant to secure a loan.

Counsel further stated that the plaintiff defaulted in repayment of the loan and subsequently the defendant demanded for payment of the arrears of Kshs. 1,029,622.14 and informed the plaintiff that failure to repay would lead to the exercise of its statutory power of sale.

It was the plaintiff's case that the defendant's statutory power of sale had not crystallized as the chargee was not served with a statutory notice of sale. He further submitted that the notification of sale was also not served on the plaintiff. Counsel submitted that the notices are a mandatory requirement and if the notification of sale was served then the auctioneer ought to have filed an affidavit to verify the same. He stated that section 90 and 96 (2) of the Land Act 2012 were not complied with which required 40 days service notice.

Counsel further submitted that section 15 of the Auctioneers Rules was not complied with by the defendant. He stated that the notice was not served on the directors of the plaintiff personally. It was the plaintiff's contention that they have called on the defendant's manager to make payment proposals of kshs. 1.5 million quarterly to liquidate the outstanding arrears but the manager did not respond.

Counsel also submitted that the plaintiff would like to be given an opportunity to pay the outstanding sum in respect of the loan or in the

alternative the plaintiff be given an opportunity to find a suitable buyer rather than subjecting the sale of the suit land to forced sale. He therefore urged the court to allow the orders of injunction.

### **DEFENDANT'S/RESPONDENT'S SUBMISSIONS**

The defendant/respondent filed its written submission and opposed the application by the plaintiff/applicant. Counsel stated that the question before this Honourable Court is the determination whether or not the Applicant is deserving of the relief of interlocutory injunction. He cited the celebrated case of **Giella —vs- Cassman Brown. & Co Ltd (1973)** whereby the principles for grant of injunctions was established. Counsel submitted that it is upon the applicant to prove that it has a prima facie case with a probability of success. He further stated that from the facts it is not denied that the plaintiff took a loan and is in default and in breach of the terms and conditions of the agreement. Counsel has also cited several authorities in opposition to the application. She therefore urged the court to dismiss the application with costs.

### **Analysis and determination**

This is an application for temporary injunctions which are equitable in nature and discretionary. I have looked at the pleadings together with the supporting documentation and Counsel's submissions.

It is not in dispute that the plaintiff was granted a facility by the defendant of which the plaintiff is in default. The argument by the plaintiff that it was not given a copy of the charge by the defendant does not hold any water at all. If such was the case what was so difficult in the plaintiff demanding for a copy of the said charge. The plaintiff is not saying that he requested for it and was denied an opportunity. The plaintiff has acknowledged that the defendant loaned it some money and the suit property was charged as security by the defendant. The plaintiff has not complained about the process of the registration of the security. The plaintiff further admits indebtedness to the defendant but asks for more time to organize itself to repay the loan.

From the submissions, the plaintiff is requesting to be given an opportunity to enter into a private treaty to sell the suit property to enable it repay the loan. When the plaintiff offered its property as security to secure a loan, it was aware of the consequences of non-payment. The court cannot renegotiate contracts for parties. The duty of the court is to arbitrate on the disputes that arise but not to tell parties how to negotiate or implement their contracts. This has been held in several cases as the court does not want to jump into the arena of conflict.

The plaintiff stated that it had approached the defendant to pay the amount in arrears by instalments but the defendant had not responded. This would have been the easier way to renegotiate the payment options including the alternative for entering in a private treaty to sell the property.

The plaintiff also contradicts its assertion that the statutory notices were not served and in the same breath acknowledges that it received letters dated 8<sup>th</sup> March 2017 demanding payment for the arrears and another one dated 7<sup>th</sup> July 2017 informing them that the defendant would exercise its statutory power of sale if the default is not rectified. What more did the plaintiff want the defendant to do after complying with the statutory provisions?

I will not deliberate further in this matter because from the pleadings and documentation on record, it shows that the plaintiff has not established a prima facie case with a probability of success to warrant the court to exercise its discretion to issue a temporary injunction against the defendant. Asking for more time to reorganize oneself to repay a loan is not one of the principles for grant of an injunction. I will also not go to the other limbs as the balance of convenience lies in favour of the defendant who would like to realize its security as per the charge document.

Having said that, I find that the plaintiff's application dated 20<sup>th</sup> November 2017 lacks merit and is therefore dismissed with costs to the defendant.

**Dated and delivered at Eldoret this 21<sup>st</sup> day of June, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Miss Chesio for Defendant/Respondent and in the absence of Mr. Ombati for Plaintiff/Applicant

Mr. Koech: Court Assistant