

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 87 OF 2017

HENRY KIPKOSGEI CHERONO.....PLAINTIFF/APPLICANT

VERSUS

SIDIAN BANK LIMITED.....1ST DEFENDANT/RESPONDENT

MESHACK LIMO KERING.....2ND DEFENDANT/RESPONDENT

RULING

Henry Kipkosgei Cheron (*hereinafter referred to as the plaintiff*) has come to this court against **Sidian Bank Ltd** and **Meshack Limo Kering** praying that a temporary injunction be issued to restrain the sale of property namely the parcel of land title **No. Irong/Iten/667**, pending the hearing of the suit. He further prays that the 1st defendant by itself, auctioneers, agents and servants be restrained from relying on the 45 days redemption notice, notification of sale and schedule of property served on the plaintiff on 18.1.2017 and 23.2.2017 to sell the property namely the parcel of land title No. Irong/Iten/667.

The application is based on grounds that the plaintiff/applicant was served with the 45 days redemption notice, notification of sale and the schedule of the property in respect of the plaintiff's land Irong/Iten/667 on 18.1.2017 and 23.1.2017. The sale of the and Irong/Iten/667 was to take place after the expiry of 45 days from January, 2017 on the instructions of the 1st defendant/respondent. It is alleged that the statutory and other notices were never served on the plaintiff/applicant prior to 18.1.2017 and 23.1.2017.

The 2nd defendant/respondent cannot be traced after efforts to do so have been fruitless to date and no disclosure of the amount of loan borrowed, lent, repaid, unpaid and other pieces of information have been made by either of the defendants or both of them to the plaintiff/applicant to date. He pleads with the court to exercise its power and discretion to allow this application.

In the supporting affidavit, Mr. Henry Kipkosgei Cheron states that on 23.1.2017, he met the Auctioneers and was served with a 45 days redemption notice, notification of sale and schedule of property relating to the registered land title No. Irong/Iten/667 approximate area being 0.10 Ha. The loan was taken by the 2nd defendant and that the plaintiff did not receive any loan. The plaintiff tried to locate the 2nd defendant but did not succeed. The plaintiff states that he was not served with a statutory notice of sale as required by the law. He claims that very crucial information was withheld by the defendants.

The 1st defendant states through Beverline Chweya, the Legal Officer, that they advanced Mr. Meshack Limo Kering a banking facility of Kshs.1,500,000, which was guaranteed by the plaintiff through a charge and a further charge over the subject property being land parcel number Irong/Iten/667. The 2nd defendant defaulted in paying the loan and as at 31.7.2017, the outstanding amount was Kshs.2,223,165.34. The loan was consolidated with an overdraft facility of Kshs.4,319,104.35. The plaintiff and the borrower breached their obligation to pay and have not repaid to-date.

The defendant issued the first statutory notice to both the borrower and guarantor but they failed to pay within 3 months as envisaged by the law. The borrower and guarantor were both notified through their respective addresses but failed to rectify. The 1st respondent instructed Serve Auctioneers to recover the loan through a sale by auction of the subject properties. The auctioneers issued a notification of sale by Auction as envisaged under Auctioneers Act, thus Rule 15 of the Auctioneers Act. In a nutshell, the 1st defendant states that the 2nd respondent borrowed money the plaintiff guaranteed and the 2nd respondent has defaulted and therefore, he is bound to pay the outstanding sum.

The plaintiff submits that the notice of statutory power of sale was never served by the 1st respondent and therefore, there was no basis of the redemption notice, notification of sale and schedule of property without serving the notice of statutory power of sale. Moreover, no notice of default of payment was made.

The respondent submits that the applicant has failed to establish a prima facie case with probability of success as the plaintiff has breached the charge agreement by failing to pay the outstanding loan balance. On irreparable harm, the 1st defendant argues that the plaintiff voluntarily charged the property well knowing of the consequences involved in case of default. On balance of convenience, the defendant submits that he stands to suffer greater inconvenience as he holds money in trust and deals with the money in trust for deposits and shareholders hence the public interest question is crucial. The plaintiff has failed to honour the agreement and has caused the 1st defendant to lose money and therefore, the 1st defendant will suffer greater injustice if the injunction is granted. The 1st defendant further submits that he complied with the law in exercising the statutory provisions of sale.

I have considered the application and do find that there is no dispute that the 2nd defendant is in default and in arrears having failed to pay the

outstanding amount as agreed. The question is whether notice of statutory power of sale was issued. I have looked at the replying affidavit of Beverline Chweya and do not see any certificate of postage. The document annexed to the affidavit of service by Samuel Muthama sworn on 18.8.2017 does not amount to a certificate of postage. It has no letterhead; the dates are not clear and only shows that Samuel Muthama reached the General Post Office but does not show that he actually posted the letters. On this point alone, I do find that the plaintiff has established a prima facie case with a probability of success as postage of the notice of the statutory power of sale is everything in such matters.

However. Since I have found that the debt is outstanding, I do order that the 1st respondent to go back to the drawing board and comply with the law by issuing a proper notice of statutory power of sale. Therefore, the court orders that the 1st respondent be and is hereby restrained from selling the property. The 1st respondent to issue a proper notice of exercising statutory power of sale. Each party to bear own costs

Dated and delivered at Eldoret this 20th day of June, 2018.

A. OMBWAYO

JUDGE