



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E & L CASE NO. 339 OF 2017**

**SIMON KIPKOECH KWAMBAL.....PLAINTIFF**

**VERSUS**

**SIDIAN BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOHN MUITA T/A JOMUKI AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff, **Simon Kipkoech Kwambai** has come to court under Order 40, Rules 1, 2, 3 of the 2010 revised Civil Procedure Rules and section 3A of the Civil Procedure Act by way of Notice of Motion dated 10.10.2017 praying that the defendants by themselves, their servants and or agents be restrained by way of a temporary injunction from selling, offering for sale, alienating or in any way whatsoever dealing with land parcel **Tembelio/Elgeyo Border Block 1(Kapkei) 44** pending the hearing and determination of the suit.

The application is based on grounds that the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant without any colour of right intends to sell the land parcel No. **TEMBELIO/ELGEYO BORDER BLOCK 1(KAPKEI) 44**, through private treaty. The subject land is owned by the plaintiff/applicant which is the matrimonial home. The 1<sup>st</sup> defendant has already instructed the 2<sup>nd</sup> defendant who has advertised the said property and the same was due for sale by public auction on 9<sup>th</sup> October, 2017, which sale failed to attract a bidder who met the reserve price. There is no valid redemption notice and notification for sale in respect of the subject land.

The application is supported by the plaintiff's affidavit sworn on 10.10.2017. He states he is the registered owner of all that parcel of land known as **TEMBELIO/ELGEYO BORDER BLOCK 1(KAPKEI) 44**. The 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant has advertised the said property and the same was due for sale by public auction on the 9<sup>th</sup> October, 2017. That he was served by post with the 45 days redemption notice attached together with the notification of sale by the 2<sup>nd</sup> defendant.

That his advocate on record informs him, which information he verily believes to be true that the 45 days redemption notice cannot be served concurrently with the notification of sale as this will be in breach of law.

That he is further advised by his advocates which advice he verily believes to be true that in the premises, the said notification of sale is null and void for want of compliance with section 74 of the Registered Lands act, now repealed. That the intended sale is therefore unlawful and illegal.

The applicant laments that the property is a matrimonial property. He is reliably informed that after the 2<sup>nd</sup> defendant failed to find a buyer through public auction, on the 9<sup>th</sup> October, 2017, he intends to sell it by private treaty. That he does pray that the defendants be restrained from selling his matrimonial home through private treaty. This application is informed by good faith, by reason that he only acted as a guarantor for his daughter, who has since left the country.

That his efforts to get the statement of accounts from the 1<sup>st</sup> defendant has been in vain so that he can get to know the real amount he is supposed to pay. That what is deponed to herein is true and within his knowledge, save where expressed to the contrary.

The 1<sup>st</sup> defendant filed a replying affidavit stating that the 1<sup>st</sup> defendant advanced several loans to the borrower which upon the borrower's request were restricted and consolidated into a term loan of Kshs.2,578,231.89. A letter of offer was issued to the borrower. The loan was secured through a legal charge on the suit property. The term loan was to be repaid together with interest in monthly instalments.

The borrower defaulted and the outstanding amount stood at Kshs. 2,969,906.07. In essence, the borrower defaulted hence breaching the terms of the loan agreement. The 1<sup>st</sup> respondent claims to have issued the first statutory notice under Section 90(1) and 2(b) of the Land Act, 2012 giving the plaintiff and the borrower notice to rectify the default within 3 months.

The plaintiff and the borrower failed to rectify the default within 3 months prompting the 1<sup>st</sup> respondent to issue a notice of intent to exercise its statutory power of sale under section 96(2) of the Land Act, 2012.

The plaintiff and borrower were duly served. The respondent further states that valuation was done. The auctioneers were instructed to recover the loan through sale by auction. The notification of sale was issued and the 45 days redemption notice was issued. Public auction was conducted but no serious bids were forthcoming hence the process was not completed. The amount owed were stated in the notices according to the respondent.

The property, though matrimonial, was charged and therefore the defendants were not impounded by the matrimonial property as it became a commodity for sale because of the charge. Spousal consent was obtained as required by law.

The plaintiff submits that the court should consider two issues, thus; whether the conditions for issuance of an injunction has been met and whether the right of statutory power of sale has accrued.

On whether the conditions for issuance of an injunction has been met, the plaintiff argues that this is a matrimonial property with sentimental value and that monetary compensation cannot be sufficient. Moreover, that the balance of probability does not favour the defendants as the plaintiff is in possession. The plaintiff argues that the statutory power of sale had not accrued as the auctioneers did not issue a proper redemption notice.

The defendant submits that the plaintiff has not established a prima facie case with a likelihood of success as it is not denied that the plaintiff is in breach of the contract made between the parties.

On irreparable loss, the defendant submits that the plaintiff has not established that he is likely to suffer irreparable harm.

On balance of inconvenience, the defendant submits that the 1<sup>st</sup> defendant stands a higher risk of injustice if the orders sought by the plaintiff are granted. The court should take whichever course that appears to carry the lower risk of injustice if it would turn out to have been wrong. The defendant further submit that the sale was conducted within the provisions of law.

I have considered the application, response to the application and rival submissions and do find that the 1<sup>st</sup> defendant provided a banking facility in form of a term loan to the borrower and the plaintiff guaranteed the loan. The borrower defaulted and the 1<sup>st</sup> defendant sought to recover the loan through sale of the charged property in exercise of the chargee's statutory power of sale. The amount owing at the time of default is stated as Kshs. 2,969,906.07 as at 10.10.2017 plus an overdrawn amount in the current account of Kenya Shillings 49,136.83. It is not controverted by the plaintiff that the loan was owing and that there was a default. I understand the plaintiff's complaint being that due process was not followed especially when it comes to the notification of sale and redemption notice.

The plaintiff main argument is that there is no valid redemption notice and notification for sale in respect of the subject land. It is the plaintiff's contention that the redemption notice was served concurrently with the notification of sale and that this was unprocedural.

Rule 15 of the Auctioneers Rules provides that a notification of sale must be served prior a sale of immovable property. The notification of sale must give 45 days upon which to redeem the property.

This court is of the considered, view that the two notices can be issued concurrently. The notice to sell is in a prescribed form and should be issued by the chargee. The chargee should not proceed and complete any contract of sale of charged land until at least forty (40) days have lapsed from the date of service of the notice to sell. Under Rule 15 of the Auctioneers Rules, the auctioneer is required to give a notification of sale of 45 days before the sale.

The 40 days given in section 96(2) is to pre-empt the entering into contract of sale in respect of the charged land but does not mean that the auctioneer has to wait for the lapse of 40 days in order to issue the notification of sale. It is my considered view that the notification of sale under the Auctioneers Rules can be issued concurrently with the notice to sell under section 96(2) of the Land Act.

It is trite law and principle of statutory interpretation that when two competing acts construed to further the purposes behind them produce a conflict, the court may resolve the conflict by taking into consideration as to which Act represents the "superior purpose" in addition to other relevant factors. In applying a principle construction in addition to other relevant factors, this court finds that the two notices are separate and distinct and provided for under different legislation and therefore, can be issued concurrently.

I do find that the defendant is capable of compensating the plaintiff if the plaintiff succeeds in the suit. The property can be valued as it is a charged property to be treated as a commodity for sale. On balance of convenience, I do further find that the same tilts towards not granting the injunction as the defendant will be more inconvenienced if injunction is granted as the plaintiff owes it a lot of money since 2014 which he is unable to pay and therefore, the plaintiff cannot be allowed to hold both the money and the land. Ultimately, the application is dismissed with costs.

**Dated, signed and delivered at Eldoret this 10<sup>th</sup> day of August, 2018.**

**A. OMBWAYO**

**JUDGE**