



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 868 of 2017

WASHINGTON ODUOR ONWAYO.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

HIGH CLASS AUCTIONEERS.....2ND DEFENDANT

RULING

1. On the 13th November 2017, the plaintiff (applicant) filed an application by way of notice of motion of even date under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010, Section 1, 1A, 3, 3A & 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya against the 1st and 2nd defendants respondents. He is seeking the following orders;

a) Spent.

b) Spent.

c) Spent.

d) That pending the hearing and determination of this suit, this Honorable Court be pleased to issue an order of injunction restraining the 1st defendant/respondent by itself, agents, servants or any other claiming through it from selling by Public Auction the plaintiff's land parcel number **LR NO. KAMAGAMBO/KABUORO/4323 (the suit property)** due for public auction on 16th November 2017.

e) That this Court be pleased to issue an order of inhibition inhibiting the 1st respondent or any other person from selling the plaintiff's property **LR NO. KAMAGAMBO/KABUORO/4323 (the suit property)** and preserve the same.

f) That costs of the application be provided for.

g) That such further and/or other orders be made as the court may deem fit and expedient.

2. The application is premised on the grounds, among them, that the advertised property for sale is a matrimonial property and therefore protected by the provisions of **sections 24, 25 and 28 of the Land Registration Act, 2012** and that the applicant is ready and willing to clear any outstanding arrears, and continue paying the loan.

3. The application is further premised on the annexed affidavit of the applicant and copy of the standard newspaper advertisement in respect of the suit property marked WOO-1. The applicant averred, inter alia, that the suit property was charged to the 1st respondent over financial loan facilities in the sum of Ksh 500,000. That the applicant used the loan facility to restock his hardware business which later collapsed and could not service the loan effectively. That the suit property is matrimonial property which has been undervalued for sale through public auction and he is likely to suffer irreparable loss and damage which cannot be compensated by virtue of its sentimental value.

4. The 1st respondent is represented by learned counsel, Mose, Mose and Milimo Advocate. The application is opposed and the 1st respondent seeks its dismissal with costs.

5. By submissions filed on 18th April 2018, the applicant represented by learned counsel, Kirui and Company Advocates, contended that the

applicant has repaid a sum of **Ksh. 480,000** out of **Ksh500,000**. of the loan facility and he has done so promptly. That the intended recovery of the balance sum of the loan facility is unwarranted as even the suit property is undervalued for sale by public auction. That the period of time for the repayment has not lapsed. That the applicant has shown a prima facie case and that it would be just, fair and expedient for the application to be allowed.

6. In their submissions dated 27th June 2018, learned counsel for the respondents urged the court to dismiss the application as there is no dispute that the applicant obtained a loan of **Ksh 500,000** from the 1st respondent and charged the suit property for the loan. That the terms of the charge include that the applicant was to repay the loan within the agreed period of time and in default the 1st respondent has a right to recover the loan by the exercise of its statutory power of sale.

7. Counsel submitted further that the applicant admitted that he is in arrears of the loan repayment hence the suit property stands for sale as per the loan agreement. He cited the case of **Giella v Cassman Brown & Co Ltd (1973) EA** on the conditions for the grant of injunctions. He also referred to **Paul Kamau Maina & 11 others vs. Kenya Civil Aviation Authority (2015) eKLR** and **Palmy Co. Ltd –vs- Consolidated Bank of Kenya Ltd (2014) eKLR** by O.N Makau J and F Gikonyo J whereby interim injunction was declined and allowed respectively.

8. I have considered the application, the reply thereto and submissions including authorities cited by counsel herein. At this stage, the issues for determination are whether (a) the applicant has presented a prima facie with a probability of success (b) irreparable injury would result if the injunction sought is not granted (c) when the court is in doubt, the balance of convenience will tilt in favor of the applicant, see **Giella case (supra)** further to decision in **E.A Industries v Trufoods (1972) EA 420**.

9. The issues are the three principles which anchor any order of injunction are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially, see **Ngurumani Ltd v Jan Bonde Nielsen and 2 others (2014) eKLR**.

10. On the issue of a prima facie case in civil case, I am guided by its definition by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others(2003) KLR 125** that It is more than an arguable case. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial.

11. On the face of the application have the respondents violated the rights of the applicant? It is common baseline that the applicant charged the suit property to the 1st respondent and that there are arrears of the loan amount advanced to the applicant. There is no evidence of the applicant to show several payments of the loan towards clearing of the outstanding arrears. Therefore, it is clearly doubtful that the applicant has no outstanding arrears of the loan.

12. This court is aware of Sections 5, 6, 7 and 10 of the Matrimonial property Act, 2013 on the rights and liabilities of a person, meaning of matrimonial property, ownership of matrimonial property and spousal liability respectively. I also note overriding interests under **Section 28 of the Land Registration Act 2012**. In the instant case, the applicant has not shown that the suit property is matrimonial property.

13. In a nutshell, the applicant charged the suit property to the 1st respondent and the latter has lawfully moved to exercise its statutory power of sale. The said property has become a commodity for sale. This court cannot clog the 1st respondent's statutory right of sale to realize the suit property which the applicant offered for the loan advanced to him; see **Palmy case (supra)**

14. In the premises, I find that the applicant has not met the threshold laid down in **Giella case (supra)**. The application is unmerited in the circumstances.

15. The upshot is that the application dated 13th November 2017 by the applicant is disallowed accordingly.

16. Costs of the application be in the cause.

Dated, Signed and Delivered this 15th day of **November** 2018.

G.A.M.ONGONDO

JUDGE

In presence of :-

The plaintiff – Non appearance for him.

Mr. Kerario Marwa learned counsel holding brief for Mose for the 1st defendant

Plaintiff/applicant – Present

Tom Maurice – Court