



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 232 OF 2016

MUSA K. CHEPSOM.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

Musa K. Chepsom (hereinafter referred to as the plaintiff) has come to court for an order of temporary injunction to restrain the defendant either by itself, its agents, servants or any person acting on its instructions from selling by public auction, private treaty or interfering in any other way with the peaceful use and occupation of parcel No. Baringo/Sabatia-103/619, 620 and 621 by the plaintiff. The application is based on grounds that the plaintiff/applicant is the registered proprietor of all these parcels known as Baringo/Sabatia-103/619, 620 and 621 and had charged the same to secure a loan of Kshs. 600,000 from the respondent. The respondent had withdrawn Kshs. 68,000 from the applicant's account on 8th July 2016 and 28th July, 2016 being Kshs. 16,000 and Kshs. 52,000 respectively from the applicant's account No. 1310199098997 at its Eldama-Ravine branch. The respondent has further instructed Keysian Auctioneers to sell the applicant's properties mentioned above on 25th August, 2016 without following due procedure and the law. Furthermore, that the applicant has not been served with requisite 90 days' notice under Section 90 of the Land Act, 280, Laws of Kenya therefore the actions of the respondent are illegal. That it is prudent and just that this application should be allowed. That no prejudice shall be suffered by the respondent if the application herein is allowed. That the applicant will suffer substantial loss in the event the illegal auction is not stopped.

The application is supported by the affidavit of Musa K. Chepsom who states that his true place of abode is Eldama Ravine in the Republic of Kenya and that he is the registered proprietor of parcels of land No. Baringo/Sabatia-103/619, 620 and 621. That he did charge the mentioned properties above to secure a loan of Ksh. 600,000 on 31st July 2014 from the respondent and that he has been consistently repaying the loan on monthly instalment of Kshs. 31,000 since the year, 2014. That in the month of July, the respondent withdrew Kshs. 16,000 and Kshs. 52,000 respectively from his account No. 1310199098997 at its Eldama-Ravine branch without any prior notice to him.

That he has since noticed that the respondent has instructed Keysian Auctioneers to sell the above-mentioned parcels on 25th August, 2016 by public auction. That he is advised by his advocate on record whose advise he verily believe to be true that it is a mandatory requirement of law that a requisite 90 days' notice ought to have been served upon him by the respondent before they could auction the charged property. That the actions of the respondent are therefore illegal, null and void for non-compliance with the law. That he shall suffer great prejudice unless this honourable court grants the orders sought herein. That he has a prima facie case with high chances of success. That he is desirous to clear the loan and the respondent should not sell the properties since the law requires that only the amount needed to correct the

default be paid and not for it to pursue the entire balance even when it is not due.

The respondent opposed the application vide the affidavit of Sydney Were who states she is advised by the company advocates on record which advice she verily believe to be true that the said application is bad in law, incompetent, mischievous, frivolous, misleading, an afterthought and an abuse of the court process and ought to be out rightly dismissed at the earliest opportune time. That as has been admitted by the plaintiff in his application, the plaintiff approached the defendant on 6th of June, 2014 for a loan facility of Kenya Shillings Six Hundred thousand (Kshs. 600,000/=). That the plaintiff's request was approved and vide a letter of offer dated 16th June, 2014, the plaintiff was granted the loan facility. That the loan facility was a business loan advanced towards the construction of rental units and was to be repaid in 24 monthly instalments of Kshs. 30,538 attracting interest at the rate of 17% per annum on the principle amount. That it was also a term of the agreement that the plaintiff would ensure that there are adequate funds in his account to meet the loan repayments as and when they fall due. That it was a term of the agreement the loan will be secured by a first legal charge over the suit parcels of land; Baringo/Sabatia-103/619, Baringo/Sabatia-103/620 and Baringo/Sabatia-103/621.

After the plaintiff's account was credited with the loan amount, he started defaulting in making the monthly instalments and his loan account remained in arrears attracting huge interests. That as at 23rd August, 2016, the outstanding amount due to the defendant was Kenya Shillings Four Hundred and Nineteen Thousand One Hundred and Eighty and Five Cents (Kshs. 419,183.05). That due to the plaintiff's failure to honour his obligation to repay the outstanding amount as per the agreed instalments, the defendant served him with the several statutory notices under section 90(a) and (2) of the Land Act, 2012. That despite being served with the three month statutory notices referred to above, the plaintiff failed to regularize his account/rectify the default leaving the same to continue accruing in arrears and that upon the lapse of the statutory notice referred to herein the defendant issued the plaintiff with a redemption notice under the provisions of Section 96 of the Land Act 2012.

That in addition to the service of the redemption notice issued by the defendant, the Auctioneers instructed to exercise the statutory sale of the suit properties issued and served the plaintiff with another 45 days' redemption notice and notification of sale. That the prior to exercising its statutory power of sale over the suit properties, the defendants instructed a registered valuer to determine the forced sale value the property in compliance with the provisions of Section 97(2) of the Land Act, 2012.

That upon completion of all the procedural requirements, the defendant was mandated to undertake before exercising its statutory power of sale, the suit properties were advertised for sale on 1st August, 2016 through the Standard Newspaper. The plaintiffs entered into a contractual agreement with the defendant voluntarily and obtained independent legal advice on the defendant's right to exercise its statutory power of sale under the charge which is not disputed, the applicant should therefore pay its dues. That the plaintiff has had ample and sufficient notice to repay the amount owed to the defendant and the suit herein is unmerited and made in bad faith with the aim of defeating the defendant's rights.

According to the respondent, the plaintiff shall not suffer any irreparable loss and damage should the defendant be allowed to proceed with the statutory power of sale. That the defendant stands to suffer irreparably if it is inhibited from exercising its statutory power of sale as the outstanding amount is likely to outstrip the value of the suit property. That is informed by their advocates on record which advice he verily believe to be true that the plaintiff/applicant will not suffer irreparable loss if the defendant proceeds to dispose the suit property to recover the outstanding amount and that the balance of convenience lies with the defendant being allowed to recover what is owed to it by the plaintiff.

I have considered the application, supporting affidavit, replying and supplementary affidavit and do find that as is the practice in such cases in applications for temporary injunction, the power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) whether the applicant has demonstrated a prima facie case with a probability of success.

2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.

3) Where the balance of convenience tilts if the court is in doubt.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted to him. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. **Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

The charge is not denied and that the allegation that the plaintiff is in arrears of Kshs.419,180.50 is also not denied. It is also evident that the plaintiff was served with the Notice of Demand, Statutory Notice of Sale and therefore, the procedure was complied with. I do find that the plaintiff has not established that he has a prima facie case with a likelihood of success. On the second limb of irreparable loss, I do find that the defendant is capable of compensating the plaintiff for any loss likely to be incurred. Moreover, by offering his property for security, the chargor's is equating his property to a commodity which the chargee may dispose of so as to recover his loan together with interest thereon. On balance of convenience, I do find that it tilts hands not granting the injunction as the amount owed might outstrip the value of the suit property. The application is therefore dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF FEBRUARY, 2017.

A. OMBWAYO

JUDGE