



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET

E & L CASE NO. 188 OF 2016

ESTHER JEROTICH ROTICH.....1ST PLAINTIFF

JOHN KIPKURUI ROTICH.....2ND PLAINTIFF

VERSUS

SIDIAN BANK LTD [Formerly K-REP BANK LTD].....DEFENDANT

RULING

The plaintiffs have come to court by way of Notice of Motion dated 1.7.2016. They pray for a temporary injunction to restrain the defendant/respondent by himself, his agents or servants or whomsoever from taking any action for the recovery for the money due and owing after the expiry of Ninety (90) days from 23.3.2016 and/or from 11.4.2016 as per the Notice dated 23.3.2016 against the plaintiffs/applicants and in respect of the parcels of land namely title No. Pioneer/Ngeria Block 1 (EATEC)/8956 and Tarakwa/Langwai Block 1(Biseria)/92 pending the interpartes hearing of the application and the main suit. They pray that this court grants them reasonable time to remedy or rectify the default, if any, upon the taking of accounts on the amount of loan repaid and the balance of loan unpaid.

The application is based on grounds the plaintiffs/applicants were served with a letter dated 23.3.2016 on 11.4.2016 and have been given ninety (90) days from 23.3.2016 and yet accounts have not been taken on the loan repaid and the balance of loan unpaid to-date. The food kiosk business which is the source of money to repay the loan by the plaintiffs/applicants has since collapsed and that such collapse has made the plaintiffs/applicants to look for alternative ways of rectifying or remedying the situation and that the Loan documents have never been served on the plaintiffs/applicants.

The application is supported by the affidavit of Esther Jerotich Rotich who states that on 11.4.2016, she received a call from somebody from the bank inviting her to the bank but before she went there, she received a copy of a Statutory Notice dated 23.3.2016 from the said bank. That she left for their only home at Eldoret Outspan and discussed the matter with her husband, John Kipkurui Rotich.

That the statutory notice relates to the land parcels No. Pioneer/Ngeria Block 1(EATEC)/8956 and Tarakwa/Langwai Block 1(Biseria)/92 in the names of her husband, John Kipkurui Rotich and Benjamin Kiprotich Sambu respectively. That they are employees of the Moi University and the Moi Teaching and Referral Hospital whose salaries have been exhausted and pay slips overburdened due to parental, children fees, family and other responsibilities. That they have had financial and other problems due to the collapse of her food kiosk business at Zion mall the main source of money that she used to repay the loan. That between 11.4.2016 and October, 2016, they set fundraising and other harambee activities in

motion in order for her to raise the amount of money required to rectify the default and meet the monthly instalments towards repaying the loan balance as required by the bank and until their financial position/status improves.

That the 90 days' notice in the statutory Notice dated 23.3.2016 expired on 23-2015 after which the bank was at liberty to sell or dispose of the securities and yet they did not get the notice until 11.4.2016 when she received it at the bank which also served her guarantors.

That they have had talks and expressed concerns over the bank's intentions to auction the parcels of land with the bank as securities or collaterals that have let them to agree on setting in process fundraising and other harambee activities to raise money due to their current financial status which is very bad. They need a period of time to raise the money to repay the loan, the court's protection of the parcels of land from being auctioned by the bank and the taking of accounts on the amount of loan repaid and the balance of loan unpaid so far for they have never been given any documents from bank ever since 2015 or before then to date during which period a substantial amount of the loan has been repaid accordingly.

The application is opposed by the defendant, through one Patrick Koech, the Relationship Manager who states that he is the Relationship Manager of the defendant's Eldoret Branch where the loan account in dispute is housed. He is therefore conversant with the matters in question and thus competent to swear this affidavit. He deposes that it is true that in December 2014, the 1st plaintiff took a loan of Kshs.1,500,000 from the defendant herein which was secured, inter alia, by the following securities:

a. A legal charge over Pioneer/Ngeria block 1(EATEC)/8956 in the names of John Kipkurui Rotich.

b. A legal charge over Tarakwa/Langwai (Biseria)/92 in the names of Benjamin Kiprotich Sambu.

c. A deed of guarantee and indemnity by John Kipkurui Rotich.

d. A deed of guarantee by Benjamin Kiprotich Sambu.

That from the letter of offer the loan was to be repaid by monthly instalments of Kshs.58,457. However, the 1st plaintiff has been erratic in the repayments of the installments thus, occasioning default in servicing of the loan. Indeed, the 1st plaintiff readily admits default in paragraph 7 of her affidavit dated 1st July, 2016. That the defendant has written to the 1st plaintiff at least 3 times advising her that her account was in arrears. That from annexure S6, 7 and 8, it is plain that the 1st plaintiff acknowledged receipt of the letters by appending her signature on them. That besides, the 1st plaintiff has always had free access to statements on her loan account. That it is therefore plainly untrue when the 1st plaintiff alleges that she has not been advised on the status of her account by the defendant. That notwithstanding, the foresaid truism, he is advised by the defendant's advocates on record and which information he verily believe as true that the question of accounts has never been accepted as a valid basis for issuing an order to restrain a financier from exercising its statutory power of sale where the account is clearly in arrears.

Following the default, the 1st defendant issued a statutory notice of its intention to exercise its statutory powers of sale of the securities as provided for in the law and the charge documents. The notice is clear that the 90 days' period it was to run was to kick off 10 days after the date of postage of the notice if it was posted. The notice was sent to the 2nd defendant and Benjamin Kiprotich Sambu by registered post on 8.4.2016. The 1st plaintiff readily admits that she collected the same notice from the defendant's office on 11.4.2016. The defendant is aware of his own knowledge that as at the time of the 1st plaintiff moving this court, the defendant had not instructed Auctioneers to advertise the securities for sale because it was clear to the defendant that the earliest the statutory notice was to mature was 11.4.2016, the 90th day after collection of the last notice by the 1st plaintiff. That it is therefore, clear that the 1st plaintiff's contention that the notice was not properly served has no basis either in fact or law.

I have considered the application and supporting affidavit and the replying affidavit and the rival submissions 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 plaintiffs admit being indebted to the defendant. In fact, they are trying to raise money through fundraising to clear the loan. Moreover, they admit that they were called and collected the Notice of Statutory power of 90 days as to run from 11.4.2016. I do find that the plaintiff has not established a prima facie case with a likelihood of succession as they are indebted and that they received sufficient notice. They appear to be seeking the courts sympathy and not discretion as they have admitted owing the money.

On the issue of irreparable harm that cannot be compensated, this court finds that it is the plaintiff's burden to prove that the sale will occasion him irreparable damage that the defendants cannot compensate. This has not been established.

On balance of convenience, it tilts towards not granting injunction as the defendant is likely to suffer damage as the debt will outstrip the borrowed sum. Ultimately, the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE