REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 19 OF 2016

MUHIA DANIEL KIMEU……...…...…1ST APPLICANT

EUNICE WANJIRO MUTISO……...…....…2ND APPLICANT

VERSUS

EQUITY BANK (KENYA) LIMITED…….....….1ST RESPONDENT

ANTIQUE AUCTION AGENCIES…….…….....2ND RESPONDENT

RULING

The application before court is dated 29.1.2016 wherein the applicants pray for orders that an interlocutory injunction be issued against the defendant jointly and severally restraining them from selling, advertising, transferring/or in any manner whatsoever dealing with the land parcel known as Eldoret Municipality Block 5/763 pending hearing and determination of the suit. The application is based on grounds that damages shall not be at adequate and fair remedy and that the balance of convenience tilts towards maintaining status quo. The application is supported by the affidavit of Muhia Daniel Kimeu and Eunice Wanjiro Mutiso whose import is that the 1st defendant advanced him a loan facility on or about April, 2010 of Kshs. 1,500,000 (One Million Five Hundred Thousand Only).

It is claimed that by way of collateral agreement/guarantee, he surrendered his title document to land parcel known as Eldoret Municipality Block 5/763 and sought a further charge/loan facility of Kshs. 3,500,000 (Three Million Five Hundred Thousand Only) from the 1st defendant and he was instead issued with Kshs. 3,100,000 (Three Million One Hundred Thousand Only). In April 2010, he commenced and continued servicing the loan regularly and faithfully until 2013 when his financial ability was affected by his involvement in a road traffic accident with his co-plaintiff which saw himself and his co-patient affected. To that effect, he duly notified the bank and even borrowed them a small loan to assist boost and/or alleviate the situation. He was shocked on the 27th January, 2015 when he found a redemption notice and a notification of sale found at his home. That the defendants demand Kshs. 1,971,302.62 from him, failure of which they were to sell the suit land. He is aware that the notices and the intended exercise of the statutory power of sale are irregular, illegal and a nullity for the reasons.

The plaintiff claims that 1st defendant subjected the loan on unagreed/unconsented varied interest rate hence prejudicially altering the entire engagement with the plaintiffs and that the 1st defendant has not issued any valid statutory notice as required by law. The notification of sale issued by the 2nd defendant seeks to recover a sum of Kshs. 1,971,302.62 which amount cannot be the subject of the loan and/or arrears. It is alleged that the amount sought to be recovered flouts the induplum principle under section 44A of the Banking Act, Cap. 488 being 11 times the principal amount. The respondent has not specified

the exact breach/default of the loan contract and/or charge terms that have been flouted. The respondent has not specified the exact and actual amount that requires to be paid to remedy the breach and that no valuation prior to sale has been carried out. Exhaustion of remedies has not been carried out by the 1st defendant taking steps to enforce the overdraft contract as against the principal-debtor.

According to the plaintiff, the notification of sale is a nullity as it indicates that the encumbrances in the suit land is in favour of Equity Bank Limited to secure a sum of money which has never been entered at the Lands register and has never been executed by the plaintiff.

The 1st and 2nd defendants filed a replying affidavit stating vide a letter of offer dated 15th March 2010, the plaintiffs were advanced a loan facility of Kshs.1,500,000 to be repaid in thirty six (36) monthly instalments of Kshs.54,229 secured by a first legal charge over property Eldoret Municipality Block 5/763 to cover Kshs.1,500,000 and deed of rental assignment over the said land and vide a letter of offer dated 15th June, 2011, the plaintiffs applied for a facility of Kshs.3,500,000 to be repaid in sixty (60) monthly instalments of Kshs.83,265 secured by a further legal charge over Eldoret Municipality Block 5/763 (hereinafter referred to as the "suit property") to cover an aggregate of Kshs.4,600,000. The two loan amounts which were disbursed to loan account 0300597610647 are currently outstanding at Kshs. 1,931,203.62 as at 12th October, 2015. It is worth noting that the loan continues to accrue interest.

That subsequently after the loan had been disbursed, the 1st plaintiff defaulted in the repayment of the loan prompting the 1st defendant to commence security realization process. Thereafter, a demand notice dated 14th May, 2015 was sent to the plaintiffs and proof of posting obtained. The 1st defendant then issued a notice of exercise of statutory power of sale dated 15th June, 2015 to the plaintiffs. The plaintiffs failed to regularize their account prompting the 1st defendant to issue the plaintiff with a redemption notice dated 12th October, 2015 with a copy to the 1st defendant and proof of posting obtained. The 1st defendant also issued instructions to the 2nd defendant to proceed with the sale of the property in compliance with the provision of the law. It is worth noting that the plaintiffs have been allowed ample time to redeem the suit property which they failed and as such, any claims to the contrary are malicious and aimed at misleading this Honourable court.

The defendant states that bank's statutory power of sale had rightly accrued and the plaintiff ought not to be allowed to fetter this power by employing delaying tactics and obtaining orders by misrepresenting facts to this Honourable court and believe that this honourable court cannot rewrite contracts between parties hence cannot impose terms on the parties herein as proposed by the plaintiffs. The plaintiff has acknowledged default of the loan and service of the notices and therefore is under obligation to pay the loan as it had been agreed with the 1st defendant. There is no agreement varying the terms of the loan facility and as such, the plaintiff is in breach and cannot raise a red herring or hoodwink the court to escape their legal obligation.

In his submissions, the plaintiff argues that he has satisfied the court that there exists a prima facie case with a probability of success as there have been irregular and/or improper levying of penalties interests on the loan by the 1st respondent's report to the suit prior to advertisement coupled with the absence of clear extent of default and/or arrears, outstanding balance if any especially given that the plaintiffs having faithfully been servicing the loan. The plaintiffs claim to have made substantial repayment of the loan amount and that the intended sale would amount to irreparable loss to the plaintiffs. The plaintiffs further argue that the balance of convenience tilts hands granting an injunction.

The defendants on their part argue that the applicant has acknowledged being indebted the defendant and therefore, should not claim any equitable remedy. They therefore humbly pray that the plaintiff case fails. In the **Mrao case *(supra)***, Bosire J. A (as he then was) stated that a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of an applicant's case upon trial. That is clearly a standard which is higher that an arguable case. 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.

On ***prima facie case***, I do find that the plaintiff is indebted to the defendants. The statement of account shows that the plaintiff is in arrears of Kshs. 1,931,203.62 as at 12.10.2015. However, I have looked at the demand notice dated 14,5,2015 which is alleged to have been sent to the plaintiff. There is no evidence of postage. I have not seen a certificate of registration of the mail. The same applies to the statutory notice and the redemption notice. There is no certificate of postage. Having found that there is no evidence of postage of the vital notices, I do further find that the plaintiff has demonstrated a prima facie case with the probability of success as failure to serve the perquisite notices is serious breach of the law and once the plaintiff alleges that he was not served the burden shifts on the defendant to prove that he served.

On the issue of ***irreparable harm***, I do find that the market value of the property to be sold is Kshs. 30,000,000 and therefore, the plaintiffs are likely to suffer irreparable harm if the same is sold. Moreover, the ***balance of convenience*** tilts towards issuing an injunction to forestall to sale as the value of the property is far more than the money owed. However, in the interest of justice, I do order that the defendants do undertake the process afresh by serving a demand notice and issuing a fresh statutory notice following the whole due process according to law. Costs of the application to be borne by the defendant.

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

A. OMBWAYO

JUDGE