



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 375 OF 2016

WILLIAM CHESILUT LELEI.....APPLICANT

VERSUS

JACOB KIPKETER SISEY.....1ST RESPONDENT

ECO BANK KENYA LTD.....2ND RESPONDENT

WATTS AUCTIONEERS.....3RD RESPONDENT

RULING

Plaintiffs case

The plaintiff, *William Chesilut Lelei* claims that in the year 2012, he guaranteed the 1st defendant a loan facility of about Kshs.3,993,186.00 with the 2nd defendant with a collateral security of land parcel known as *Eldoret Municipality Block 21(King’ong’o) 2058* registered in his name. The 1st defendant further offered the security of his motor vehicle registration number KBL 014H as it is contended that in or about the year 2014, the 1st defendant vide CMCC No. 269 of 2014 sued the 2nd and 3rd defendants after they advertised the suit land for sale by public auction seeking an order of injunction. The plaintiff claims that he was never party to the suit and that the same is pending in the High Court vide Appeal No. 7 of 2014 with orders of stay pending the hearing and determination of appeal.

However, to the plaintiff’s shock, the parties have agreed to compromise the appeal without his knowledge, involvement and/or consent. That the plaintiff now seeks for temporary and permanent injunction restraining the defendants jointly and severally from selling, auctioning, trespassing adversely dealing with and/or offering for sale of land known as Eldoret Municipality Block 21 (King’ong’o) 2058 pending the hearing and determination of this suit. The plaintiff avers that the intended sale by public auction due on 16th December, 2016 is uprocedural, unfair, illegal, adversarial, prejudicial and untenable in law since the plaintiff was not a party to the re-engagement of the said new terms and conditions where the suit parcel of land was the subject of the aforesaid court matters and subsequently the consent. The plaintiff further seeks for an order of declaration that in as a far as the re-engagement between the 1st and 2nd defendant vide the consent terms in Eldoret CMCC No. 269 of 2014 is concerned and his suit land he stands discharged from the dealings as a guarantor party to the dealings and/or any between the 1st defendant and 2nd defendant and subsequently seeks for an order stopping the intended sale by 3rd defendant and/or be discharged.

The applicant argues that subsequent to the consent, and by dint of default of the consent clauses by the 1st defendant, the 2nd defendant through the 3rd defendant has never advertised the plaintiff’s suit land for

sale by public auction. The applicant now seeks for temporary injunction restraining the defendants jointly and severally from selling, auctioning, trespassing adversely dealing with and/or offering for sale of land known as Eldoret Municipality Block 21 (King'ong'o) 2058 pending the hearing and determination of this suit.

The intended sale by public auction due on 16th December, 2016 is unprocedural, unfair, illegal, adversarial, prejudicial and untenable in law since the applicant was not a party to the re-engagement of the said new terms and conditions where the suit parcel of land was the subject of the aforesaid court matters and subsequently the consent. The applicant shall suffer unjustly, unfairly, and prejudicially if the said suit parcel of land shall be subjected to forced sale yet the plaintiff was not part of the consent leading to the intended sale by auction.

The suit lodged raises fundamental and just issues with a high probability of success. That the plaintiff/applicant is being condemned unheard as against the rules of natural justice. That no amount of damages can compensate the plaintiff in the event the suit land is sold by way of auction. The plaintiff states that if the intended public auction is allowed, he will suffer irreparably.

The 2nd Defendants case

In the replying affidavit of Sammy Miringu, an employee of the 2nd respondent as a Remedial Officer well versed with the facts and occurrences resulting to instant application states that he knows that the application is an afterthought coming almost 6 months after the consent was entered into and is purposely calculated to defeat the 2nd respondent's right accruing from the consent order by grinding to halt the wheels of justice. That from the onset, he knows for a fact that the instant application is a ploy by the applicant and 1st respondent to defeat the interest of the 2nd respondent accruing from the consent order by halting the wheels of justice and this is exhibited by the fact that the applicant concealing to this Honourable Court his relation with the 1st respondent which is that of a father and son. That he further knows that a similar application was done in Eldoret CMCC No. 269 of 2014 by the 1st respondent which application was dismissed after hearing.

The respondent states that the 1st respondent being aggrieved with the ruling of the subordinate court opted to appeal vide Eldoret ELC Appeal No. 7 of 2014. That he further knows that thereafter, the 1st respondent's appeal was never prosecuted and thereafter, the 1st respondent approached the 2nd respondent for an out of court settlement with a view of salvaging the suit land from sale. That he further knows that resultant upon the negotiations, the amount due and owing was reduced and a consent entered into on how the amount due and owing was to be defrayed with the consent settling both the subordinate court matter and the appeal before this Honourable court. That it was the term of the consent that the 1st respondent was to make good his indebtedness to the 2nd respondent on or before 30th November, 2016, failure of which the 2nd respondent was to advertise for sale the suit property charged without further notices to the 1st respondent and that upon the default by the 1st respondent, the property of the applicant was advertised for sale as per the consent order and judgment.

That from the foregoing premises above, he knows for a fact that this Honourable court sitting as an appellate court in Eldoret ELC Appeal No. 7 of 2014 and there being a consent order between the 1st and 2nd respondent settling the appeal, this Honourable Court became *functus officio*. That he further knows that the consent order settling the appeal has never been set aside or varied and thus the applicant cannot move court to set aside or vary the consent through the instant application or suit. That, allowing the prayers sought through the instant application and suit will be tantamount to this court setting aside a consent order vide a plaint, defeating its appellate jurisdiction and issuing two contradictory orders.

That he further states that if the same was to happen, then it would amount to an abuse of the court process as if the suit succeeds, then they will have a lower court consent order or judgment that is different from the order of this court, thus making the two court have conflicting orders and or judgments.

That he further knows that the 2nd respondent rights to sell the suit property crystalized way back in 2014 when the 1st respondent defaulted to repay the sums due and owing. The applicant right to redeem the property was never exercised to date with the facility advanced to the 1st respondent remaining unpaid to date.

That it is not true that if the suit property is sold, the applicant stands to suffer irreparably as the suit land became an *ipso facto* commodity of sale with monetary value when it was charged and it was on the basis of its market value that the facilities were advanced to 1st respondent. That the scheduled auction was procedurally fair, legal and in accordance with the consent order that has never been set aside and or varied and that the plaintiff knew from the onset the repercussion of standing surety for a loan that is not to be repaid. That from the foregoing premises, it is thus trite that the applicant has no prima facie case with high chances of success and that if at all a loss is occasioned from the sale of the suit land, then the same can be adequately compensated by way of damages.

SUBMISSIONS BY THE APPLICANT

The gravamen of the plaintiff's submission is that this court has the prerequisite jurisdiction to entertain the suit as the applicant is the registered owner of the Suitland known as Eldoret Municipality Block 21(King'o ng'o) /2058, which property was on the verge of being auctioned by default of consent judgment in Eldoret C M CC no 269 of 2014 involving the 1st and 2nd respondents. The applicant was never a party in the case and was never party to the consent and therefore the court has jurisdiction.

The plaintiff applicant further argues that the consent between the 1st respondent who is the borrower and the 2nd respondent who is the chargee is not binding to the applicant who is the chargor as the chargor was never a party to the consent and the proceedings in the lower court and therefore the intended sale is illegal. Where the creditor without the prior agreement with the guarantor, agrees with the principle debtor to vary the terms of the contract guaranteed, unless it is self-evident that the variation is not substantial or not prejudicial to the guarantor the guarantor is not bound by the variation. Lastly, the plaintiff argues that he was discharged as a guarantor by dint of the consent in CMCC NO 169 of 2014 and buttresses this argument by stating that a guarantor becomes automatically discharged

SUBMISSIONS BY THE RESPONDENTS

The 2nd respondent argues that no amount of damages can compensate him in the event of the Suitland being sold in a public auction. Moreover, that the application is an abuse of the court process as it is calculated to make different courts exercising different jurisdiction arriving at different contradictory decisions. The 2nd respondent further argues that the court lacks jurisdiction and that the suit property is ipso facto a commodity for sale by virtue of the guarantee and the consent dated 27th May 2016. Moreover, the 2nd respondent argues that the instant suit is the proper way to approach in the circumstances as the proper approach was that the applicant should have moved by way of setting aside or reviewing the consent under the provisions of order 45 of the civil procedure rules 2010 and not by filing a separate suit.

DETERMINATION

The 1st issue I will delve in is whether the court has the prerequisite jurisdiction to entertain this dispute. The 2nd respondent argues that the jurisdiction of this court is threefold thus original, supervisory and appellate and that the court can only exercise one jurisdiction at a time and where it exercises one jurisdiction in a matter it becomes *functus officio* in exercising in the other jurisdiction in the same matter over the same issue it has made a decision.

On the other hand the plaintiff argues that he is the registered owner of the parcel of land known as ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O)/ 2058 which property was on the verge of being auctioned by default of the consent judgment in Eldoret CMCC NO 269 of 2014 involving the 1st

and 2nd defendant. The plaintiff was never party in the matter and to the resultant consent and therefore the only recourse is for the plaintiff to come to this court. The plaintiff relies on Article 162 (2) b of the constitution of Kenya 2010 to buttress his argument that the court has the prerequisite jurisdiction and section 13 of the Environment and Land Court Act to expound on the argument. The legal question is whether the plaintiff is entitled to bring this second suit to challenge the consent order.

I have considered the rival arguments and do agree with the plaintiff that this court has the prerequisite jurisdiction to entertain this dispute as it is a dispute that falls within disputes envisaged by Article 162(2) b of the constitution of Kenya 2010 and section 13 of the Environment and Land Court Act Chapter 12A Laws of Kenya as it relates to title to land and falls within the provisions of section 150 of the land Act no 6 of 2012 which provides for the jurisdiction of the Environment and Land Court thus that the Environment And Land Court established in the environment and land court act shall have the jurisdiction to hear and determine disputes actions and proceedings concerning land under the act. The 2nd defendant appears to be confusing the principles of *res judicata* and *jurisdiction* as the former relates to matters already determined by a court of competent jurisdiction between the same parties or parties under whom they claim whilst the latter relates to matters which the court has no power to adjudicate. This being a land dispute between the chargor and the chargee, this court has jurisdiction.

On whether the application and the instant suit is the proper way to approach the court in the circumstances, **looking at the nature of the reliefs sought by the plaintiff in this suit especially relief (c), I do find that they are in form of declarations and therefore can only be brought by way of plaint as the same cannot be brought by way of review under order 45 of the Civil Procedure Rules 2010 especially by persons who were not parties to the suit. I do find that the plaintiff's election to bring a fresh suit to challenge the consent judgment in the first suit is proper and regular in the circumstances.**

On whether to grant or not to grant a temporary injunction, I have considered the evidence on record and the submissions of counsel and do find that the plaintiff has established a prima facie case, with a likelihood of success as the plaintiff was not party to the consent dated 27th May 2015 and yet property which is registered in his name is likely to be sold. It was necessary to enjoin the plaintiff as a party.

On irreparable harm that cannot be compensated with damages, I do find that the plaintiff is likely to suffer harm that cannot be compensated with damages due to the fact that his right to redeem the property has been affected without his knowledge and that there is no evidence that the suit property has been valued. Lastly, the balance of convenience tilts towards granting injunction as the plaintiff is in possession. Ultimately the application is allowed costs in the cause.

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

A.OMBWAYO

JUDGE