



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA

ELC. CASE NO. 435 OF 2017

KITALE MAIN MILLERS LIMITED.....1ST PLAINTIFF

PATRICK NJAU.....2ND PLAINTIFF

GILBERT MAINA MUHIA.....3RD PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED.....1ST DEFENDANT

VIEWLINE AUCTIONEERS.....2ND DEFENDANT

RULING

The Plaintiffs filed the application dated 7/4/17 before the Thika High Court under certificate of urgency. Since the Judge in Thika was not sitting, the matter was brought to the Environment and Land Court, Milimani Nairobi. The court certified the matter urgent and directed that the Defendants were to be served for *inter partes* hearing on 19/4/2017. The 1st Defendant was served and it filed its Replying Affidavit. Oral arguments were made by counsels for the Plaintiffs and the 1st Defendant.

The Plaintiffs seek an injunction to stop the sale of Thika Municipality Block 21/2082 (“the Suit Property”) pending hearing of the application and of the suit. The application is supported by the 2nd Plaintiff’s affidavit. The Plaintiffs also relied on the annexures to the affidavit. The thrust of the Plaintiffs’ argument is as follows:

- i. No application for land control board consent to charge the Suit Property was made;
- ii. The Suit Property is matrimonial property;
- iii. The Plaintiff never executed the letter of offer and the charge;
- iv. Statutory notices for sale were not served on the Plaintiffs who reside in Kitale;
- v. That from the documents annexed to the 1st Defendant’s Replying Affidavit, the debt due was from Wananchi Hardware & Tools which is not related in any way to the 1st Plaintiff; and
- vi. It is also argued that the demand for payment issued by the 1st Defendant was on account of Bim Investment Limited, which is not related to the Plaintiffs.

The Plaintiffs contend that the public auction advertised in the Daily Nation does not indicate the time, place and date of auction.

The application was contested. The 1st Defendant relied on the Replying Affidavit of Zipporah Wachuka, its Recoveries Officer. The 1st Defendant avers that the Plaintiffs should not be granted the equitable remedy they seek for failing to make material disclosures to the Court.

Firstly, the Plaintiffs failed to disclose that the loan sum of Kshs. 28 million was remitted into the Plaintiffs bank account and that, the Plaintiffs had been making monthly payments of Kshs. 777777.78 to the 1st Defendant towards the repayment of this loan.

Secondly, the Plaintiffs have alleged that the Suit Property is matrimonial property yet it is owned by the 1st Plaintiff Company. The 1st Defendant annexed copies of the 1st Plaintiff's certificate of incorporation and a copy of its title over the Suit Property which shows that the 1st Plaintiff is the registered proprietor of the Suit Property. The 1st Defendant also relied on the letter of offer, charge, guarantee and indemnity executed by the Plaintiffs, copies of which were annexed to the 1st Defendant's Replying Affidavit.

Counsel for the 1st Defendant conceded that he had not annexed the application for land control board consent but that he had annexed a copy of the receipt issued on payment of the fees for the application to the land control board for consent to charge the Suit Property together with a copy of the consent granted to charge the Suit Property.

The 1st Defendant maintains that statutory notices for sale were issued to the Plaintiffs and annexed evidence of postage of letters to the Plaintiffs.

Lastly, counsel for the 1st Defendant argued that the time, place and date of option are indicated on the notice which appeared in the Daily Nation of 3rd April 2017 which indicates that the auction was scheduled for Thursday, 20th April 2017 at 11.00 am outside Main Post Office Thika Town.

The 1st Defendant's counsel urged the court to dismiss the application for not satisfying the threshold set out in **Giella V. Cassman Brown & Co. Ltd** [1973] EA 358 and for failing to make full disclosure of the facts to the Court.

The court has looked at the application, supporting affidavit, Replying Affidavit and duly considered the rival arguments by counsels for the Plaintiffs and the 1st Defendant and notes the following:

- On the face of it, the Plaintiffs duly executed the letter of offer on 3/9/2014 as well as the charge over the Suit Property dated 23/9/2014.
- The 2nd and 3rd Plaintiffs also executed a Guarantee and Indemnity in favour of the 1st Defendant on 3/9/2014.
- The 1st Plaintiff, which is a company, is registered as the proprietor of the Suit Property which is unlikely to be matrimonial property.
- A copy of the search dated 26th September 2014 confirms that the Suit Property was charged to the 1st Defendant to secure the sum of Kshs. 28 Million.
- The Plaintiffs made an application to the 1st Defendant on 17/6/2015 for credit in which they gave the details of the Suit Property and indicated that its approximate value was Kshs. 45 Million.
- Notices were sent to the Plaintiffs on the addresses they gave while executing the guarantee and indemnity on 3/9/14, which is P. O. Box 170-10208 Saba Saba. The 2nd and 3rd Plaintiffs also gave this address while executing the letter of offer for overdraft facilities on 3/9/14. Copies of these letters were sent to the 2nd and 3rd Plaintiffs in Kitale.

In light of these facts, the Court is not persuaded that it ought to exercise its discretion in favour of the Plaintiffs who deny any knowledge of the loan.

The Court declines to grant the orders sought in the application dated 7/4/17.

The file will be sent back to Thika for hearing and determination of the suit.

Dated and delivered at Nairobi this 20th day of April 2017.

K. BOR

JUDGE

In the presence of: -

Ms. Tum for the Plaintiffs/Applicants

Ms. Michira and Mr. Otieno for the 1st Defendant/Respondent

Mr. V. Owuor- Court Assistant