



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 262 OF 2015

KENNETH WAIGANJO KIHARA.....PLAINTIFF

VERSUS

BANK OF AFRIC KENYA LIMITED.....DEFENDANT

RULING

1. What is before the court for determination is plaintiff's Notice of Motion dated 15th September 2015. The application is brought inter alia under Order 40 rules 1 (a), 2 (1) and 3 of the Civil Procedure Rules, 2010.

The plaintiff seeks the following prayers:

1. Spent.

2. Spent.

3. *THAT this Honourable Court be pleased to grant an Order of injunction restraining the defendant herein, its agents, employees, servants or any person acting under its authority from selling or advertising for sale by private treaty or by public auction, trespassing onto, transferring or from taking possession of alienating or in any other way interfering with the plaintiff's ownership, enjoyment, use and development of all that property **Title No. Naivasha/Maraigushu Block Naivasha/Maraigushu Block 13/283, Title No. Naivasha/Maraigushu Block 13/356 and Title No. Naivasha/Maraigushu Block 13/353 pending hearing and determination of this suit.***

4. *THAT pending the hearing and determination of this application and the suit, an order of injunction do issue restraining the defendant through its employees and/or agents or in any manner whatsoever from purporting to exercise any remedy pursuant to the charges registered against the title to the suit property.*

5. *THAT this honourable court be pleased to make such order as it deems mete and just.*

6. *THAT the costs of this application be provided for.*

2. The application is supported by the plaintiff's affidavit sworn on 15th September 2015 and filed in court on 17th September 2015. The plaintiff deposes that he is the registered proprietor of the parcels of land known as Naivasha/Maraigushu Block 13/283, Naivasha/Maraigushu Block 13/356 and

Naivasha/Maraigushu Block 13/353, all collectively referred to as the suit properties. That he charged the suit properties in favour of the defendant on 28th April 2011 to secure a loan of Kshs.1,500,000 and on 19th September 2012 to secure a loan of Kshs.4,000,000. Both loans were advanced to Interchange Kenya Limited, a Company in which he is a director. Owing to financial setbacks which occurred in the year 2014, the company faced difficulties in settling the outstanding loan. As a result, the defendant issued to him a demand dated 28th January 2015 for KShs. 14,335,176.14 being amount due inclusive of interests. Subsequently, M/s Keysian Auctioneers acting on behalf of the defendant issued to the plaintiff a notification of sale dated 8th July 2015 in which the open market value of the suit properties was indicated Ksh.10,050,000/= which in the plaintiff's view is impracticable since the plaintiff believes that the open market value of the property as at the date of the affidavit was Ksh.30,000,000/=.

That the statutory notice and the notification of sale were issued without carrying out a fresh valuation of the suit properties to determine the market value. That the proposed sale of the suit properties is therefore unlawful and un-procedural. Further that his mother aged 80 years is living on the suit properties and the sale would therefore render her destitute and homeless. For these reasons, the plaintiff urged the court to grant the orders sought.

3. The defendant has opposed the application through the replying affidavit of Ben Mwaura the defendant's Debt Recoveries Manager, sworn on 7th October 2015 and a further affidavit sworn on 23rd October 2015 by the said Ben Mwaura.

Mr. Mwaura deposes that the plaintiff is a serial defaulter who as at 7th October 2015 owed the defendant Ksh.14,405,961.98 on account of the loans herein. That the plaintiff was served with a three months statutory notice dated 28th January 2015, 40 days statutory notice 11th May 2015, 45 days Redemption Notices dated 6th July 2015 and 8th July 2015 and notification of sale dated 8th July 2015. He exhibited copies of the said notices as well as evidence of postage. That a valuation report dated 15th June 2015 was obtained for the suit properties that consent of the land board was obtained and that the proposed sale was advertised in the dailies. In conclusion the defendant urged the court to dismiss the application.

4. Parties opted to argue the application by way of written submissions. In that regard the plaintiff filed his submissions on 25th April 2017 while the defendant filed its submissions earlier on 10th March 2016.

5. I have considered the application, the affidavits filed in support and in response to the application as well as the submissions. The plaintiff admits that there was default in the repayment obligations. The plaintiff does not deny being served with statutory notice, 40 days statutory notice and 45 days Redemption Notices. The plaintiff's complaint is that the statutory notice and the notification of sale were issued without carrying out a fresh valuation of the suit properties to determine the market value. I note that a valuation report by Real Appraisal Ltd dated 15th June 2015 was prepared. I am therefore satisfied that the provisions of section 97 (2) of the Land Act, 2012 were complied with. Even if there were to be any non-compliance with those provisions the plaintiff would have ample remedy under the provisions of section 97 of the Act. I find that no *prima facie* case with a probability of success has been established. In the circumstances I need not enquire into whether or not the other limbs of the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** have been established.

6. Notice of Motion dated 15th September 2015 is dismissed. Costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr. Karungo holding brief for Mr. Kimani for the defendant/respondent

Court Assistant: Gichaba