



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1060 OF 2016

GITERE KAHURA INVESTMENTS LIMITED.....1ST PLAINTIFF

KENYA BOX BODY BUILDERS LIMITED.....2ND PLAINTIFF

VERSUS

KENYA PLANTERS CO-OPERATIVE UNION LIMITED.....1ST DEFENDANT

REGENT AUCTIONEERS.....2ND DEFENDANT

RULING

Through the application dated 31st August 2016, the Plaintiffs seek an injunction to restrain the Defendants, their agents, servants and or officers from proceeding with the threatened advertisement and auction of the parcels of land known as L.R. No. 4872/1 and 4872/2 owned by the 1st and 2nd Plaintiffs respectively (“the Suit Properties”), pending hearing and determination of this suit. The second prayer in this application was overtaken by events as no interim orders were granted when the Plaintiffs first came to court.

The 1st and 2nd Plaintiffs are the registered proprietors of the Suit Properties situated North West of Ruiru Township. The application is brought on the following grounds:

- a) The Plaintiffs were surprised when they received notices issued by the 2nd Defendant on 8th August 2016 threatening to auction the Suit Properties on 12th October, 2016 alleging that each Plaintiff owed the 1st Defendant Kshs. 212,527, 533.99 as at 22nd January, 2016. The Plaintiffs claim that the last time they had any dealings with the 1st Defendant was 25 years ago;
- b) The Plaintiffs deny borrowing any money from the 1st Defendant. They contend that the only charge that was ever registered against the 2nd Plaintiffs title was in favour of Agricultural Finance Corporation (AFC) way back in 1997 and that that charge was duly discharged when the 2nd Plaintiff settled the debt it owed to AFC;
- c) No statutory notice of sale was served upon the Plaintiffs as stipulated by the Land Act;
- d) The 1st Defendant’s demand is time barred and that it offends the provisions of the Limitations of Actions Act; and
- e) The Plaintiffs are apprehensive that the 2nd Defendant may dispose of the Suit Properties at a throw away price since a valuation to ascertain the current market value of the Suit Properties was

not done.

The application is supported by the affidavit of David Wakangu Gitere, a director of the 1st Plaintiff. Copies of the following documents were annexed to the Plaintiffs' Affidavit: the title in respect of the Suit Property; the mortgage executed on 29th May, 1984 between the 2nd Plaintiff and AFC confirming that AFC advanced it the loan of Kshs. 3.5 Million; and, the two notices issued by the 2nd Defendant to the Plaintiffs. The notices indicate that the two Suit Properties would be sold by public auction on 12th October, 2016 to recover the loan balance of Kshs. 212,527,533.99 against each parcel of land. These were the outstanding loans as at 22nd January, 2016.

The application is opposed. The 1st Defendant relied on the Replying Affidavit of its Acting Managing Director. The 1st Defendant avers that the 1st Plaintiff charged L.R. No. 4872/1 to the Kenya Planters Cooperative Union Limited (KPCU) by a way of a mortgage dated 9th April 1986 to secure a loan of Kshs. 3 Million while the 2nd Plaintiff charged L.R. NO. 4872/2 to KPCU through a mortgage dated 16th April, 1986 to secure the loan of Kshs. 2 Million. The 1st Defendant relies on copies of certificates of postal searches to support the assertion that the Plaintiffs owe the 1st Defendant the sums demanded. The 1st Defendant did not produce copies of the mortgages. The 1st Defendant concedes that L.R. No. 4872/2, which is owned by the 2nd Plaintiff was charged to AFC in July 1985 and that there was a further charge to AFC in 1997.

The certificate of postal search dated 29th May, 2015 in respect of L.R. No. 4872/1 reads on the encumbrances section as follows;

Notification of charge dated 3rd July, 1985 by Agricultural Finance Corporation for Kshs. 1,500,000/= subject to wayleave agreement regd. in Vol. N 13 folio 354/28, Caveat regd. in Vol. N13 Vol folio 335/36 and No. 2 above.

Mortgage dated 3rd April, 1986 to Kenya Planters Cooperative Union Limited for Kshs. 3,000,000/= subject to no. 2 and 3 above.

The certificate of postal search dated 21st July, 2015 in respect of L.R. No. 4872/2 reads as follows;

“Notification of charge dated 3rd July, 1985 by Agricultural Finance cooperation for Kshs. 2,435,500 subject to wayleave agreement registered in vol. No. 13 folio 354/27, 28 and 29 and caveat registered in vol. N. 13 folio 335/36 and number 2 above.

Mortgage dated 16th April, 1986 to Kenya Planters Cooperative Union Limited for Kshs. 2,000,000/= subject to Wayleave agreement and caveat regd. in Vol. N.13 folio 354/28, Vol N. 13 Vol 354/27, Vol N.13 vol 355/36 and numbers 2 and 3 above.

Notification of charge dated 26th June 1997 by KPCU for Kshs 2,435,500/=.

The 1st Defendant maintains that a statutory notice was issued to the 2nd Plaintiff. On the issue of the Plaintiffs not having had any dealings with the 1st Defendant for 25 years, the 1st Defendant argues that the 2nd Plaintiff acknowledged the existence of the debt through its Advocates letter of 18th April, 2016. The letter states that the 2nd Plaintiff's director and KPCU entered into a debt settlement agreement on 30th June 2009 for payment of Kshs. 10 Million in settlement of the alleged debt owed to the 1st Defendant herein and that this sum was paid. The letter was in response to the 1st Defendant's Advocates' letter of 22nd January, 2016 demanding payment of Kshs. 212,527,533.99 from the 2nd Plaintiff. Unfortunately, a copy of this debt settlement was not produced in court.

The court has considered the application, the affidavits and the written and oral submissions made on

behalf of both parties.

The issue for determination is whether the Plaintiffs have met the threshold for the grant of a temporary injunction. The first consideration is whether the Plaintiffs have demonstrated that they have a prima facie case with a probability of success. Secondly an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. The court decides an application on the balance of convenience when it is in doubt.

The Plaintiffs maintain that they do not owe the 1st Defendant any money and also deny borrowing money or charging the Suit Properties to the 1st Defendant. The 1st Defendant did not produce copies of the mortgage to confirm that it advanced monies to the Plaintiffs. It only relied on the certificates of postal searches done on the Suit Properties to support its claims. Without the charge or other security document, the Court is unable to tell if the 1st Defendant advanced loans to the Plaintiffs which were secured by the Suit Properties. This in the Court's view confirms that the Plaintiffs have a prima facie case against the Defendants who have instructed the 2nd Defendant to auction the Suit Properties.

The 1st Defendant maintains that it loaned the 1st Plaintiff Kshs. 3,000,000/= against a charge over L.R. No. 4872/1 dated 3rd April, 1986 but was owed Kshs. 212,527, 533.99 as at 22nd January, 2016. It also avers that it loaned the 2nd Plaintiff Kshs. 2,000,000/= and 2,435,500/= on 16th April, 1986 and 26th June 1997 respectively secured by a charge over L.R. No. 4872/2 but was owed Kshs. 212,527, 533.99 as at 22nd January, 2016.

The trial court will have to determine if there was a settlement agreement between the 2nd Plaintiff and the 1st Defendant and whether the 2nd Plaintiff paid the sum agreed upon to defray the loan.

As I understand the Plaintiffs argument, it is that even if the 1st Defendant advanced the loans to them that it contends it did, then the 1st Defendant's claim for the sum of Kshs. 212,527, 533.99 as at 22nd January, 2016 against each of the two Suit Properties is untenable under Section 44A of the Banking Act. The Plaintiffs have also urged that the 1st Defendant's claim is statute- barred by the Limitation of Actions Act. The 1st Defendant rebuts this by saying since the Plaintiffs through their Advocates' letter acknowledged being indebted to the 1st Defendant, time started running from the date of the acknowledgement. These are some of the issues that the trial court will have to grapple with.

Section 44 A of the Banking Act which limits the interest that can be recovered on defaulted loans provides thus:

1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection. (2).
2. The maximum amount referred to in subsection (1) is the sum of the following:-
 - a) The principal owing when the loan becomes non-performing
 - b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing, and
 - c) Expenses incurred in the recovery of any amounts owed by the debtor.
3. If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.
4. This section shall not apply to limit any interest under a court order accruing after the order is made.

5.

6. This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following:-

- a) principal and interest owing on the day this section comes into operation, and
- b) Interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation, and
- c) Expenses incurred in the recovery of any amounts owed by the debtor.

Section 44 A applies retrospectively. Subsection 6 would apply in this case in determining the sum due if the trial court were to find that the 1st Defendant advanced loans to the Plaintiffs and that the Suit Properties were charged to the 1st Defendant to secure the loans.

The court is persuaded that the Plaintiffs have a prima facie case with a probability of success against the Defendants and it need not delve into the other two considerations for the grant of injunction. The court grants prayers 3 and 4 of the application dated 31st Aug, 2016. The Plaintiff is also awarded the costs of the application.

Dated and delivered at Nairobi this 8th May 2017.

K. BOR

JUDGE

In the presence of: -

Ms. Nyabuto for the Plaintiffs/Applicants

Mr. Wachira holding brief for Kairu for the Defendants/Respondent

Mr. V. Owuor- Court Assistant