



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 7 OF 2016

ANDREW KENGERE KIMONGE.....PLAINTIFF

VERSUS

EQUITY BANK LTD.....1ST DEFENDANT

JO-MWAKA AUCTIONEERS.....2ND DEFENDANT

R U L I N G

1. The plaintiff filed the instant suit vide a plaint dated 9th June 2016. The plaintiff averred that he was advanced a loan facility of kshs. 2,500,000/= by the 1st defendant to finance the purchase of motor vehicle KBK 226S Toyota Matatu in or about 2010. The loan facility was secured by way of a charge over the plaintiff's land parcel **Transmara/Ololchani/193**. The plaintiff was servicing the loan facility by monthly instalments of kshs. 60,000/= but states that the Matatu he purchased developed mechanical problems and he was unable to continue the monthly repayment as agreed. The plaintiff avers that following the default, the 1st defendant revised the interest upwards to 40% and has threatened to sell the charged property by public auction to recover the loan.

2. The plaintiff simultaneously with the plaint filed a Notice of Motion application premised under Order 40 Rule (1) of the Civil Procedure Rules, Sections 1A, 1B and 63 (e) of the Civil Procedure Act and inter alia sought the following substantive orders:-

(1) That pending the hearing and determination of this suit the 2nd defendant/respondent, their agents, workers, servants or any other persons authorized by themselves be restrained by way of an injunction from advertising, selling, disposing and/or interfering with in any way whatsoever with any property of the plaintiff more particularly land parcel number Transmara/Ololchani/193 by way of a permanent injunction.

(2) That the costs of the application be provided for.

3. The plaintiff/applicant premised the application on the grounds set out on the body of the application and on the supporting affidavit sworn in support of the application by the plaintiff dated 9th June 2016. The plaintiff acknowledges that he was advanced by the 1st defendant a loan facility against the security of land parcel **Transmara/Ololchani/193** and that he was servicing the loan at the rate of kshs. 60,000/= from the proceeds of the Matatu Motor Vehicle KBK 226S Toyota which he had purchased with the loan proceeds. The plaintiff states he is not able to service the loan repayment at the monthly rate of kshs. 60,000/= owing to a mechanical breakdown of the Matatu but states he is ready and willing to service the loan facility at the rate of kshs. 20,000/= per month.

4. The plaintiff avers that the defendants have advertised the suit property for sale to recover the loan and wishes the defendants to be restrained from selling the property and instead he be afforded time to re-organize himself to be able to service the loan facility. The plaintiff avers he stands to suffer irreparable damage if the defendants proceed to sell his property by public auction.

5. One Arnold Mugodo, Credit Manager of the Kilgoris Branch of the 1st defendant swore a replying affidavit in opposition to the plaintiff's Notice of Motion application. The 1st defendant avers that the plaintiff was advanced a loan of kshs. 1,500,000/= vide a letter of offer dated 18th March 2011 repayable over a period of 36 months at the rate of kshs. 54,229/= monthly and a further loan of kshs. 2,200,000/= vide letter of offer dated 10th May 2012 repayable over 60 months at kshs. 64,573/= monthly. The loans were secured by way of a charge and further charge over **LR No. Transmara/Ololchani/193** registered in favour of the 1st defendant. The loans were advanced to the plaintiff for purposes of constructing rental units in **LR No. Transmara/Ololchani/193** and not to buy a Matatu as alleged by the plaintiff.

6. The 1st defendant avers that the plaintiff was irregular in servicing the loans prompting the 1st defendant to serve the plaintiff with the requisite statutory notice dated 16th September 2015, redemption notice dated 7th January 2016 and the notification of sale notice dated 22nd April 2016 as per annexure **"AM4"**. That the 1st and 2nd defendants complied with the legal requirements before causing the security to be advertised for sale by public auction and therefore the plaintiff has no basis to seek to restrain the 1st defendant from exercising its power of sale over the security held by the bank.

7. The plaintiff in a supplementary affidavit sworn on 22nd February 2017 acknowledges being advanced kshs. 2,500,000/= on the security of **LR No. Transmara/Ololchani/193**. The plaintiff reiterated that he had been servicing the loans and was still committed to settling the same but that he had been prompted to default in servicing the loan because his business ran into loss and the motor vehicle which was a source of income broke down resulting in him defaulting in the repayment. The plaintiff claims he is ready and willing to pay the loan amount in full if he is given time to enable him to re-organize himself averring that selling the charged property where he and his family resides would occasion irreparable damage to him as his family would be rendered homeless.

8. The application was argued by way of written submissions. The defendants filed their submissions on 6th April 2017 while the plaintiff filed his on 10th May 2017. The principles against which an application for injunction is considered are well settled. For an applicant for injunction to succeed he/she must satisfy the conditions established in the case of **Giella -vs- Cassman Brown & Co. LTD [1973] E.A 358** as follows:-

(i) That the applicant must show that he has a prima facie with a probability of success.

(ii) That the applicant must demonstrate that he stands to suffer irreparable loss or damage that cannot be compensated in damages unless the injunction is granted.

(iii) That in the event the court is in doubt, the court should consider the application on this basis of the balance of convenience.

9. The applicant in the instant suit does not deny that he is indebted to the 1st defendant. He admits there is a balance of the loan advanced to him that is outstanding and he blames the inability to service the loan as agreed to his business fortunes whereby the motor vehicle that was generating him income which he was using to service the loan broke down owing to a mechanical problem. The plaintiff asserts that he was servicing the loan regularly until the fortunes in his business undertakings changed for the worse. He wants the 1st defendant to understand and to afford him more time to pay the loan. He asserts that he would suffer irreparable loss if the land where he resides is sold.

10. The 1st defendant has submitted that the plaintiff has neither demonstrated he has a prima facie case with a probability of success or that he would suffer irreparable loss or damage if the injunction is not

granted. The 1st defendant asserts that the plaintiff was advanced the money which was secured by a charge over the suit property. The plaintiff defaulted in payment and the 1st defendant has issued the plaintiff the requisite notices but the plaintiff has failed to pay and that the 1st defendant has become entitled to realize the security to recover the money.

11. In support of the submission that the plaintiff has not demonstrated a prima facie case with a probability of success, the 1st defendant relied on the case of **Noorbegum Fazal –vs- Diamond Trust Bank [2015] eKLR** where Kamau, J. held thus:-

“Having admitted that the borrower was indebted to the defendant herein, the plaintiff had clearly not made out a prima facie case with a probability of success at trial. The question of her suffering loss that could be compensated by way of damages if the interlocutory injunction was not granted could not arise. The balance of convenience did not tilt in her favour as the issuance of the invalid statutory notices could be regularized by the defendant issuing valid statutory notices.”

12. The instrument of charge between the plaintiff and the 1st defendant clearly provided that in the event of any default in payment of the debt after demand is made to the plaintiff, provided the appropriate statutory notices have been made, the bank would be at liberty to exercise its statutory power of sale conferred under the charge to recover the amount owing. In the matter before court, the plaintiff is in effect seeking a variation of the contract he voluntarily entered with the bank. The charge constituted a contract between the plaintiff and the bank and the court cannot intervene to vary a contract that was freely entered into between the plaintiff and the 1st defendant Bank. The plaintiff is asking that he be allowed more time to settle the debt and suggests that the amount of instalment be reduced from kshs. 60,000/= to kshs. 20,000/=. The court cannot properly get involved in determining in what manner the plaintiff is to service his debt with the 1st defendant. That was something the two parties agreed when the loan offers and the charge and further charge were executed.

13. The 1st defendant has in my view demonstrated that the plaintiff was advanced the loan funds which he has not repaid as per the agreement resulting in the 1st defendant making demand and serving the requisite statutory notices on the plaintiff as required under the charge. The plaintiff has not denied receiving the letters of demand and the statutory notices. The plaintiff merely wants to be accommodated on account of his good past record when he states he was making regular repayments until when his motor vehicle broke down. On that basis the plaintiff wants to be allowed more time to arrange to settle the arrears on the loan and/or the balance of the loan. Of note however, is that the plaintiff does not deny indebtedness to the 1st defendant. Under the charge the 1st defendant was entitled to initiate recovery action once there was default on the loan repayment and consequently made demand and served the requisite statutory notices on the plaintiff. The right to realize the security had accrued to the 1st defendant and there no basis exists for the court to restrain the 1st defendant from exercising its power of sale conferred under the charge and the statute. The only option available to the plaintiff was to approach the 1st defendant to renegotiate a rescheduling of the terms of repayment of the loan if the 1st defendant was so minded. The court cannot unilaterally re-write the contract between the parties when the parties had freely entered into the agreement and had agreed to be bound by the same.

14. I am in the premises not persuaded the plaintiff has demonstrated a prima facie case with any probability of success to entitle the court to exercise its discretion to grant an injunction in favour of the plaintiff.

15. On the second limb of the conditions upon which an injunction may be granted the plaintiff has argued that he stands to suffer irreparable damage if the suit property is sold since that is where he and his family resides. The plaintiff contends that he and the family would be rendered homeless if the suit property is sold by the 1st defendant in exercise of its power of sale. In the case of **David Ngugi Ngaari –vs- Kenya Commercial Limited [2015] eKLR, F. Gikonyo, J** considered the issue whether a charged matrimonial home alone would constitute a ground to grant an injunction. In the case he held:-

“...the fact that the charged property is a matrimonial home alone will not suffice as a ground of granting an injunction as long as the chargee has fully adhered to the law”.

16. The Judge cited with approval an extract in the case of **Julius Mainye Anyega –vs- Eco Bank Limited [2014] eKLR** where the court stated:-

“The suit property may be a matrimonial home. But what is startling is the applicant’s argument which, property understood, suggest that matrimonial homes should never be sold under the mortgagee’s statutory power of sale. These statements have become quite common in applications for injunction to restrain a mortgagee from exercising the statutory power of sale. I want to disabuse mortgagors from what seems to be a misplaced posture especially defaulters. The true position of the law on matrimonial properties is that a mortgage will not be created on such property without first obtaining the consent of the spouse, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCC Number 82 of 2006. Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (in liquidation) that:

“Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdrafts is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured.”

17. The plaintiff in the instant matter definitely is invoking sentimental value of what he says is matrimonial property to seek the court’s sympathy. The charge over the suit property was registered in April 2011 before the Land Registration Act 2012 and the Land Act 2012 came into force. Prior to the enactment of the Land Act 2012 there was no requirement for spousal consent to be obtained before a charge over matrimonial property could be registered. In any case, there is no complaint by the plaintiff that there was no spousal consent to the charge and/or that appropriate notices were not given.

18. My own position is that once a charge is taken over a matrimonial property, the chargor takes the risk that the property can be sold if there is default in settling the debt. The property in my view becomes a commercial commodity in the market in the event of default and may be sold by the chargee in exercise of its power of sale pursuant to the charge. To the extent that the matrimonial property would be liable to be sold by public auction in the event of default, there is a clear indication that the chargor would not suffer irreparable damage if the property was sold as that would be in furtherance of the agreement he made with the chargee. The prospect of the property being sold in the case of default was foreseeable and hence no irreparable damage would be occasioned.

19. In the instant matter, it is my finding that the plaintiff would not suffer irreparable damage as the intended sale of the suit property by the 1st defendant in exercise of its statutory power of sale was contractual. The plaintiff’s application dated 9th June 2016 does not satisfy the threshold for grant of injunction and the same lacks any merit. I dismiss the same with costs to the defendants.

Ruling dated, signed and delivered at Kisii this 30th day of June, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Mireri for Mainga for the plaintiff

N/A for the 1st and 2nd defendants

Milcent court assistant

J. M. MUTUNGI

JUDGE