



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT ELDORET**

**E & L CASE NO. 320 OF 2014**

**DAVID KIPTUM KORIR.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**DENIS KIRUI T/A SADDABRI AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

The applicant, **David Kiptum Korir** has brought this matter against **Kenya Commercial Bank Limited** and **Denis Kirui T/a Saddabri Auctioneers** and prays for an interlocutory injunction against the defendants jointly and severally restraining them from selling, advertising, transferring or in whatsoever manner dealing with the land in dispute known as **L.R. NGERIA/CHEPYAKWAI BLODK 3 (KINGWAL)54**, pending the hearing and determination of the suit.

The application is based on grounds that the plaintiff has a prima facie case with a probability of success and that damages shall not be an adequate and fair remedy. Lastly, that the balance of convenience tilts towards maintaining the *status quo*.

The application is supported by the affidavit of David Kiptum Korir who states that he is the sole registered proprietor of the leasehold interest comprised in the land parcel known as L.R. NGERIA/CHEPYAKWAI BLOCK 3(KINGWAL)/54 which measures approximately 14.72 hectares. That the 1<sup>st</sup> defendant advanced him an overdraft financial facility on or about the year 2000. That by way of a mutual agreement/guarantee, he was asked by the bank to surrender his original title deed document to land parcel L.R. NGERIA/CHEPYAKWAI BLOCK 3(KINGWAL)/54 for the said Kshs. 500,000/= overdraft. That he was shocked on the 4<sup>th</sup> October, 2014 when he found a redemption notice and a notification of sale at his home.

Moreover, that in the notices the defendant was demanding Kshs.4,931,619.41 from the failure of which they were to sell the suit land by public auction. That the notices and the intended exercise of the statutory power of sale are a nullity for the reasons that the 1<sup>st</sup> defendant has not issued any valid statutory notice as required by law, which notices reached him or rather came to his attention early in October, 2014.

The applicant claims that the notification of sale issued by the 2<sup>nd</sup> defendant seeks to recover a sum of Kshs.4,931,619.41, which amount is not the subject of the overdraft and/or guarantee agreement and that the amount sought to be recovered flouts the *induplum* principle under section 44A of the Banking Act,

Cap. 488 being 10 times the principal amount. The respondent has not specified the exact breach of the overdraft contract and/or charge terms that have been flouted. That the respondent has not specified the exact and actual amount that requires to be paid to remedy the breach. That valuation prior to the intended sale has been carried out. Exhaustion of remedies has not been carried out by the 1<sup>st</sup> defendant taking steps to enforce the overdraft contract as opposed to the unfair, unjustly and irreparable step of auctioning the suit land. The notification of sale is a nullity as it indicates that the encumbrances in the suit land is in favour of Kenya Commercial Bank Limited to secure a sum of money which has never been entered at the Lands register as against the title and has never been executed by the plaintiff. Lastly, that he has repaid the loan to a sum in excess and that which is contained in the notices and advertisements are incorrect hence he ought to be discharged from liability and that by the notification of sale, the defendants have placed an advertisement in the Daily Newspapers on the 8<sup>th</sup> October 2014, according to the notification of sale. That he prays for reliefs herein in the best interest of justice and fairness.

The 1<sup>st</sup> defendant filed a replying affidavit sworn by Oscar Kikech who is employed by the 1<sup>st</sup> respondent as a Credit Manager at its Eldoret branch and states that it is true that the applicant is the sole registered proprietor of the leasehold interest comprised in parcel known as L.R. NO. NGERIA/CHEPYAKWAI BLOCK 3(KINGWAL)/54 measuring 14.75 hectares (hereinafter referred to as "the property) save that the 1<sup>st</sup> respondent has interest in the property as a charge. That it is also true that the 1<sup>st</sup> respondent advanced an overdraft financial facility of Kenya Shillings 500,000/= (Kenya Shillings Five Hundred Thousand Only) through account number 1102468274 in the name of the applicant in or about the year 2000 on condition, among others, that the applicant would surrender the original title for the charged property, which he did.

According to the respondent, the applicant herein accepted the terms and conditions governing the loan offered and executed the facility letter and that the applicant has not been making regular payments to liquidate the debt owing to the 1<sup>st</sup> respondent and owing to the applicant's constant defaults and the outstanding arrears, the overdraft facility continues to accrue interest. That the applicant has failed to comply with the terms and conditions of the overdraft facility and is therein abusing the *induplum rule* as there is overwhelming evidence of his indebtedness to the 1<sup>st</sup> respondent and his default in liquidating the facility.

The redemption notice was issued to the applicant by the 2<sup>nd</sup> respondent subject to a default in payment of the overdraft facility in which the applicant failed to rectify even after a statutory notice was properly issued. The 1<sup>st</sup> respondent issued a proper statutory notice as is required by law under Section 74 of the Registered Land Act, indicating the breach/default as well as the amount owing to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent instructed Mwamba Valuers to value the property which they did and thereafter submitted a valuation report which valuation report is still valid and thus the applicant's allegations that no valuation report was done prior to the intended sale are mere allegations that have no basis.

The respondent states further that the applicant was served with all the requisite notices by the Auctioneers. That the Statutory Notice issued by the 1<sup>st</sup> respondent particularly stated the nature of default/breach by the applicant in which case, the applicant failed to honour his obligations with the regards to the overdraft agreement. It is true that the interest of the 1<sup>st</sup> respondent has never been registered at any Lands registry. However, by virtue of the applicant depositing the title deed with the 1<sup>st</sup> respondent to secure the overdraft facility, an informal charge was created and at all times thereafter the 1<sup>st</sup> respondent held and continues to hold a registerable interest over the property.

According to the respondent, the amount due and owing to the 1<sup>st</sup> respondent by the applicant through his account number 1102468274 was Kshs.399,351.50 (Kenya Shillings Three Hundred and Ninety Nine Thousand, Three Hundred and Fifty One and Fifty Cents), which amount is overdue and continues to accrue interest and the 1<sup>st</sup> respondent is entitled to recover the same from the debtor. That the 1<sup>st</sup> respondent has on several occasions approached the applicant demanding from him and advising him to settle the outstanding arrears in the overdraft facility to no avail. That he is advised by his advocates on

record, which advice he verily believe to be true that the 1<sup>st</sup> respondent's rights to sell the property to secure the amount owed is a right secured by law. That the applicant's application is a waste of time and an abuse of court process and should therefore be dismissed with costs as it is brought in bad faith.

The plaintiff submits that he is not indebted to the 1<sup>st</sup> defendant and yet the 1<sup>st</sup> defendant intends to dispose of the plaintiff's land on account of default in payment of Kshs.4,931,619.41. He submits that the overdraft was fully paid. The applicant contends the legality of the notices. Secondly, the applicant contends that if injunction is not granted, the plaintiff will suffer injury that cannot be adequately compensated by damages. There is no valuation of the property. Lastly, that the balance of convenience tilts towards granting the injunction.

The defendant on its part submits that the defendant complied with section 90(1) and 96(2) of 6 of 2012 by issuing the statutory notice as required by law. The first notice was issued on 26.6.2012 whilst the second notice was issued on 8.1.2012. Moreover, that the notification of sale and redemption notice was also issued according to law. The chargor did not comply with the statutory notice and therefore, the notification of sale. Ultimately, the defendant submits that the plaintiff has not established a *prima facie* case with a likelihood of success.

The gist of this matter is that the plaintiff is the registered proprietor of the leasehold interest comprised in parcel No. L.R. NO. NGERIA/CHEPYAKWAI BLOCK 3(KINGWAL) 54 measuring 14.75 hectares. The 1<sup>st</sup> respondent has interest in the property as a charge due to the fact that the 1<sup>st</sup> respondent advanced on overdraft financial facility of Kenya Shillings 500,000 through account number [particulars withheld] on/or about the year 2000 on condition among others that the plaintiff surrenders the original title for the charged property, which he did. It is not in dispute that the plaintiff paid some money in respect of the overdraft, however, there is a dispute as to whether the whole amount was paid. This is an issue that can only be determined after hearing the parties and their witnesses, however, the documents availed by the 1<sup>st</sup> defendant in the replying affidavit reflects a balance of Kshs.399,381/=. This figure is in conflict with the figure availed in statutory notice thus, Kshs.3,732,821/= as at 30.10.2012 whilst the statement of account shows that the amount owing as at 29.2.2012 is Kshs.1,129,542/=. These figures should be interrogated at the hearing.

Moreover, the 1<sup>st</sup> defendant states that the statutory notice under Section 90(1)(2)(3) of the Land Act, Laws of Kenya relating to the suit land dated 26.2.2013 was sent by registered post. The registered post has not been availed instead the affidavit of Arasa Kinara sworn on 22.3.2013 is annexed to show that the plaintiff was served on 21.3.2013. I am not satisfied with the service depicted by Arasa Kinara as the plaintiff was not personally served.

Moreover, I do find that it is not clear how the notification of sale and the redemption notice were served as there is no affidavit of service.

Lastly, on this point of whether the plaintiff has established a *prima facie* case with a likelihood of success, I do find that there is a likelihood that the 1<sup>st</sup> defendant has breached section 44 of the Banking Act by claiming more that is required by law. Section 44 of the Banking Act, Cap 488 Laws of Kenya provides for the limit on the interest to be recovered on defaulted loans. The import of this section is that institutions are limited in what they may recover from a debtor with respect to non-performing loans to the maximum amounts which is the sum of the principal owing when the loan becomes non-performing plus the interest, in accordance with the contract between the debtor and the institution, not exceeding the principal amount owing when the loan becomes non-performing and the expenses incurred in the loan recovery. The plaintiff borrowed kshs.500,000/= through an overdraft bank facility but failed to make payment instalments as agreed and therefore the outstanding debt is Kshs.3,732,821/=:, which amount compared with the principal sum is colossal and therefore requires interrogation. The upshot of the above is that the plaintiff has established a *prima facie* case with a likelihood of success.

On the issue of irreparable loss, I do find that the plaintiff has established that he is likely to lose the land due to undue process and therefore, he is entitled to the remedy sought.

On a balance of convenience, I do find that it tilts towards granting the injunction as the plaintiff will suffer an eviction from the parcel of land whereas it is arguable that he has repaid the loan. The application is allowed. Costs in the cause.

**DATED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF JUNE, 2017.**

**A. OMBWAYO**

**JUDGE**