



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 9 OF 2016

KIPRONO TANUI KIPROST.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

Kiprono Tanui Kiprost (*hereinafter referred to as Plaintiff*) has come to court against **Kenya Commercial Bank Ltd (*hereinafter referred to as the defendant*)** praying for a temporary injunction restraining the defendant, servants, agents and/or any person acting on its behalf from advertising for sale, offering for sale, alienating or in any other manner disposing off land parcel **No. Lembus/Kiptuim/381** pending the hearing and determination of the suit.

The application is based on the grounds that the plaintiff has not been served with the statutory notice of sale as provided for under Section 90 of the Land Act, 2012. Moreover, that the plaintiff shall lose the right to equity of redemption should the sale proceed as scheduled. Lastly, that the plaintiff has high chances of success.

The application is supported by the affidavit of the plaintiff who states that he and David K. Tanui are the joint registered owner of land parcel Lembus/Kiptuim/381. The plaintiff claims that in March 2013, the directors of Glory Chemists Limited approached him to guarantee the company on loan facility they were to acquire from the defendant. He accepted the request as guarantor and 16th April 2013, he and his co-proprietor, David Kipchumba signed deed of guarantee. That since he executed the deed of guarantee, he has never received any correspondence from the defendant on how the Kshs. 8,000,000/= loan facility to Glory Chemists Ltd (The Company) was being serviced and to that extend he assumed all was well.

That on 18th January 2015, his grandson informed him that his property aforesaid was being advertised for sale by Kolato Auctioneers on the Daily Nation Newspaper and on the following day, the said Auctioneers fixed posters of the sale and he confirmed that information to be true. He has never been served by the defendant any demand notice, the 90 days' statutory notice as provided for in Section 90 of the Land Act, 2012. The Auctioneers did not serve him with the 45 days' redemption notice nor the notification of sale as provided for under the Auctioneers Rules, 1997.

That he is advised by his Advocate on record, Mr. C. D. Nyamweya, which he verily believe to be true that if the sale proceeds, his right to equity of redemption would have been extinguished. That he is further advised by his said Advocate on record which he truly believes to be true that since he was not served with the 90 days' statutory notice and the other notices, the defendant's statutory power of sale has not crystalized and that the advertisement of his property for sale without following the due process is illegal, null and void. Further that it was incumbent upon the defendant to serve the statutory notices on

all the interested parties in land Lembus/Kiptuim/381. That he shall suffer injustice and irreparable loss if the sale proceeds as scheduled as the land parcel Lembus/Kiptuim/381 is his home and at his advanced age of 90 years, he may end up with nowhere to be laid to rest upon his demise. That it is only mete and fair that the orders sought herein be granted.

The defendant filed a replying affidavit sworn by Joseph Barngetuny, a Credit Administrator of the defendant's Eldoret West branch who states that the plaintiff's subject application is inept and/or baseless and fails to disclose material facts which move is calculated to defeat the defendant's well-founded right to realize the security. Further, he is informed by his Advocates on record, which information he believes to be true that the plaintiff's conduct in itself is unclean and he is not worth of any equity before this Honourable Court. The defendant states that the plaintiff/applicant and his co-proprietor, one David K. Tanui, executed a charge by way of guarantee in favour of Glory Chemists Limited for a loan of Kshs.8,000,000/= and an overdraft facility of Kshs.2,000,000/=. Further, the said charge was duly executed on 11th November, 2013 over Title Number Lembus/Kiptuim/381. That he is informed by his Advocates on record, which information he believes to be true, that by executing the aforesaid charge, the plaintiff/applicant and his co-proprietors bound themselves to all conditions therein having read and understood before appending their signatures.

It is therefore a misrepresentation of facts by the plaintiff to aver that the loan facility was for Kshs.8,000,000/=. The correct position as per the charge is Kshs.10,000,000/= being the principal amount and that it is incorrect for the plaintiff to aver that at no point has he ever been served with any demand or statutory notice as required by law. This is so because as soon as the borrower fell in default, the defendant issued statutory notices on various dates informing the plaintiff and his co-proprietor of the need to make good the outstanding amount.

The aforesaid notices were sent by registered post to the borrower, the plaintiff and his co-proprietor, one David K. Tanui and that further, it is incorrect for the plaintiff to aver that neither him nor his co-proprietor were aware of this default. To substantiate this, the defendant claims that there were various correspondences between himself, his co-proprietor, the borrower and the bank, where at one point his co-proprietor presented a proposal for restructuring of the loan and overdraft facility. It is further stated that the defendant, with its instructed Auctioneers, followed due process and procedurally issued all the relevant statutory notices which were duly served upon the plaintiff, his co-proprietor and the borrower of which lapse of the provided period crystallized the advertisement for sale of the subject property Title Number Lembus/Kiptuim/381 and therefore the plaintiff's/applicant's application stands to be an unjustified hindrance from a valid sale which application this Honourable court should dismiss for lack of substance. Again, it is suspicious that the applicant chose to file this application alone whereas the charge was executed in a joint way with his co-proprietor who is equally aware of the amount due and owing.

That the instant application therefore is not only mischievous, highhanded, an abuse of court process but also *malafides* and uncalled for.

The **gravamen** of the plaintiff's submissions is that the main and only issue herein is whether the plaintiff was properly served with requisite notices and whether he has been denied the right to equity of redemption and whether the statutory power of sale has arisen and therefore, whether the plaintiff case satisfies the test in ***Giella Vs Cassman Brown Ltd (1973) E. A. 358*** to warrant the injunction as prayed. The plaintiff argues that the statutory notices were not served and that the register of postage dated 10.2.2015 and the said notice could be a fabrication. The plaintiff further argues that the affidavit of service by George G. Macharia dated 10.11.2015 and marked **J.B.6** is not truthful or rather factored as it confuses the plaintiff with David Kipchumba who is the co-proprietor.

On 45 days' redemption notice and the notification of sale, the plaintiff argues that exhibit J.B.(b) titled certificate of serviced is a document known only in Labour law which shows a period the employee has served and terms thereof and not a document to be used in place of an affidavit of service. This certificate cannot be taken to reduce the requirements and details of injunction needed in the affidavit of service.

The defendant submits that the plaintiff has not demonstrated the existence of a *prima facie* case as he has

adamantly defaulted in the loan repayment. He has failed to show his commitment to offsetting the loan facility. Moreover it is his submission that due process was followed.

On case for irreparable harm that cannot be compensated in damages, the defendant argues that the plaintiff has not demonstrated the same. He argues that the defendant is likely to suffer irreparable harm if injunction is granted as he will suffer financial loss.

On balance of convenience, the defendant argues that the defendant is restrained from receiving the security in exercise of its statutory power of sale, then it will not realize its loan facility while the plaintiff will happily benefit from the advanced amount.

I have considered the application and the supporting affidavit, the replying affidavit and the rival submissions and do find that the plaintiff claims that the defendant did not comply with the pre-requisite procedure of serving notice as required by law. That the statutory notice was not served as required by section 90 of the Land Act. Moreover, that the 45 days' redemption notice was not served. Paragraphs 7-11 of the replying affidavit sworn by Joseph Barngetuny explains the process of service. **J.B.2(b)** is the annexure depicting the statement of account No. [particulars withheld] between the 1.11.2013 to 26.01.2016. Moreover, the statement of account No. [particulars withheld] for Glory Chemists indicated on the loan was in arrears. I do find that it has been demonstrated that the plaintiff was in arrears of loan repayment

The statutory notice under Section 90(1), (2), (3) of the Land Act, 2012, Laws of Kenya dated 29.1.2015 is alleged as having been sent by registered mails. I have seen a list of registered postal parcels registered and ordinary parcels posted by Kenya Commercial Bank Ltd on 10.2.2015 Parcel No. 6015 was sent to Kiprono Tanui of P. O. Box 2132 – 30100, Eldoret, where Kshs.85 was paid. Parcel No. 6016 was sent to David Tanui. The respondent has also attached various correspondences indicating that the plaintiff was aware of the arrears. On the issue of the 45 days' redemption notice, I have looked at the certificate of service sworn before Nancy Njoroge, Advocate and Commissioner for Oaths and do find that the same satisfies evidence of service. Though it is not referred to as affidavit of service, it is in adequate proof of service.

The grant of temporary injunction is discretion of the court. The applicant must prove that he has a *prima facie* case with a likelihood of success. In this matter, the plaintiff guaranteed the loan but has not demonstrated that the borrower is not in arrears, in fact he is not challenging the outstanding debt. His case is that he was not properly notified, however, the defendant has satisfied this court that he sent notices as required by law to the plaintiff and borrower. The upshot of the above is that the plaintiff has not satisfied the court as required by law that he has a *prima facie* case with likelihood of success.

The second test is whether the plaintiff is likely to suffer irreparable loss that cannot be compensated with damages. This has not been demonstrated and therefore as the plaintiffs claim can be quantified in damages and the claim that he is old and therefore any sale of the property will greatly affect him does not form any basis for grant of a temporary injunction as he knew the consequences of using his property as security for a loan and therefore converting it into a commodity for sale. The application fails on this issue.

On balance of convenience, it tilts towards dismissing the application as the debt is likely to outstrip the value of the property and therefore the defendant is likely to suffer more. Moreover, the plaintiff cannot have both the money and the property, he should choose one, either to pay the loan or lose the land through due process. The application is dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE