



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 230 OF 2016**

**SAMMY MUTHAMBEI MUSYOKA.....PLAINTIFF**

**=VERSUS=**

**KENYA INDUSTRIAL ESTATES LIMITED.....DEFENDANTS**

**R U L I N G**

1. By a Notice of Motion dated 5<sup>th</sup> September 2016, the Plaintiff has brought this application seeking for orders that the Defendant/Respondent be restrained from selling, alienating, disposing or in any way dealing with all that parcel of land known as Sokoke/Dida/1032 (hereinafter the “Suit Property”). The application is supported by an Affidavit sworn by the Plaintiff Sammy Muthambei Musyoka on 5<sup>th</sup> September 2016.

2. It is the Plaintiff’s case that he used the suit property which is registered in the name of one of his guarantors -one Elisha Gona Mthengo- to secure a loan facility of Kshs 280,000/= from the Defendant in October 2013. The loan agreement stipulated that the amount advanced would attract interest at the rate of 15% per annum and the Plaintiff was required to pay a monthly sum of Kshs 13,580/= towards settlement of the loan. It is the Plaintiff’s case that he commenced repayments immediately he was granted the loan and as at the end of June 2016, he had repaid a total sum of Kshs 120,060/= to the Defendant.

3. At around that time however the Plaintiff states that he realised that the Defendant was charging irregular interests, commissions and other charges which were according to him not justified and when he brought this fact to the Defendant’s notice, the Defendant promised to investigate. As it turned out however, the Defendant never looked into the matter. Instead of remedying the situation and/or supplying the Plaintiff with a Statement of Accounts as per their agreement, the Defendant instructed a firm of auctioneers to sell the suit property which measures 7.19 hectares and is valued at Kshs 800,000 by way of public auction to recover the contested balance of the loan. The Plaintiff therefore contends that he stands to suffer irreparable damage and loss unless this court restrains the Defendant as sought in the prayers herein.

4. In opposition to the Plaintiff’s application, the Defendant has through its Acting Manager Legal Services Ms Faith A. Onyango sworn a Replying Affidavit detailing the circumstances leading to their attempt to sell the suit property by way of Public auction and have asked this court to lift the temporary orders granted to the Plaintiff restraining them from going on with the sale of the suit property. It is the Defendant’s case that the Plaintiff knowingly entered into the loan contract which required that the sum of Kshs 280,000/= advanced to the Plaintiff on 29<sup>th</sup> November 2013 be repaid in full within 24 months.

The Plaintiff however defaulted in his loan repayment obligations and thus left the Defendant with no option but to sell the suit property. The outstanding debt as at the time the Defendant instructed auctioneers was Kshs 219,480.78/= which takes into account the accrued penalty interests in the Loan Account as well as arrears then outstanding and un-serviced.

5. I have considered the Plaintiff's application and the Defendant's response thereto. I have also perused the rival submissions and authorities filed herein by the respective Advocates representing the Parties.

6. As Spry V.P. stated in the now well-known case of ***Giella -vs- Cassman Brown & Co Ltd (1973) EA 358***;

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a Prima Facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly; if the court is in doubt, it will decide an application on the balance of convenience.*

7. It is the Plaintiff's case that he was advanced a loan of Kshs 280,000/= and that he repaid the same faithfully until June 2016 when he realised that he was being charged irregular and illegal levies. He communicated this position to the Defendant and the Defendant agreed that they would launch investigations and report back to the Plaintiff. As at that time, he had paid a sum total of Kshs 120,060/= and it is his case that the Defendant then agreed that all repayments be stayed pending the investigations whose findings were to be communicated to him.

8. I find it curious that even though the Defendant has expressly denied that they charged interest other than what was agreed and more particularly that there was an agreement to stay payments pending investigations, the Plaintiff has not flagged the alleged irregular charges or levies nor has there been a demonstration that interest other than what was agreed was charged. Indeed nothing was placed before me to show that the Defendant had agreed that there be a stay of further payments after the Plaintiff had only paid Kshs 120,060/= of the total loan advanced of Kshs 280,000/=.

9. The loan which is the subject matter of this suit was advanced at the Plaintiff's request. As security for the loan, the Plaintiff through a guarantor offered, among other things the suit property as security for the loan. The conditions for the loan and the consequences of default were clearly outlined in the loan contract. A perusal of Clause 7 of the Charge Instrument (attached to the Defendant's Replying Affidavit) clearly provided that:

*“.....all monies , obligations and liabilities secured by this charge shall immediately become due and payable and the chargor and/or borrower shall provide the cash cover on demand for all contingent liabilities of the chargor and/or borrower to the chargee....on the occurrence of any of the following events:*

*(a) If the Borrower fails to pay when demanded any sum due and owing to the chargees or fails to comply with any term or condition of any facility from the chargee or fail to perform or discharge any obligation or liability of the chargor and/or borrower to the chargee.*

*(b) If the Borrower fails to observe or commits any breach of the undertakings and covenants contained in the charge, any loan agreement, facility, letter or other agreements or obligations relating to the borrowing.*

10. It is evident from the Defendant's Replying Affidavit, particularly Annexure “FAO 3” that the Plaintiff only made sporadic repayments to the Defendant and that as at 29<sup>th</sup> May 2015, the loan had attracted penalty interest and accumulated to Kshs 283,475,81/=. Statutory Notices copied to the guarantors were in this regard issued to the Plaintiff on 10<sup>th</sup> October 2014 and 9<sup>th</sup> June 2015. Arising from the foregoing it is apparent and the Plaintiff does not deny, that the amount lent to the Plaintiff by the Defendant has neither been paid in time nor at all. It is equally evident that the Defendant served a

number of notices upon the Plaintiff in regard to the default as by law required. According, I find no basis upon which to grant an injunction as sought.

11. The application dated 5<sup>th</sup> September 2016 is accordingly dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 16<sup>th</sup> day of June 2017.**

**J. O. OLOLA**

**JUDGE**