



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC SUIT NO. 355 OF 2016

FATUNA OSMAN ABDI.....APPLICANT/PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LIMITED.....1ST RESPONDENT/DEFENDANT

CASH CROP AUCTIONEERS.....2ND RESPONDENT/DEFENDANT

RULING

1. I have before me the plaintiff's motion dated 24th November 2016, which is seeking the following orders: -

1) Spent

2) Spent

3) That an order of temporary injunction do issue to restrain the defendants whether by itself, and its servants, agents or auctioneers or any other person acting on the authority of the defendants from proceeding with the intended sale by Public Auction scheduled for 29th November, 2016 from re-advertising, selling, alienating howsoever at any other time or by completing by conveyance to transfer of any sale concluded by Public Auction or leasing, letting, evicting or otherwise howsoever interfering with the plaintiff's ownership of title and/or interest of the property known as plot number LR.NO.MBWAKA/MAERENI/282 pending the hearing and determination of the suit herein.

4) That costs of and occasioned by this application be borne by the defendants.

2. The application is supported by the affidavit sworn by FATUMA OSMAN ABDI, the plaintiff, on 24th November 2016. It is also based on the following grounds.

a) That sometime in or about September, 2014 the plaintiff acquired a loan facility from the defendant for the sum of Kshs.1,000,000.00 repayable over a period of 36 months.

b) The subject property was offered as a security for the said loan.

c) The subject property is registered in the name of JUSTIN SAMINI NGAMBA who is the guarantor.

d) The 1st defendant has now instructed Messrs Cash Crop Auctioneers to sell the suit

property by way of Public Auction and a publication to that effect has been placed indicating that the sale by Public Auction shall be conducted on 29th November, 2016 at the offices of Dikemwa Auctioneers NSSF Building, 8th floor, Nkurumah Road, Mombasa at 11.00 a.m.

e) The defendants' conduct is oppressive to the plaintiff as the plaintiff had already made elaborate arrangements to make payments so as to offset the outstanding loan and the defendant had already been notified of the same.

f) That unless restrained by an order of this Honourable court the defendants will go ahead with the intended sale by way of Public Auction and this will scuttle the arrangements already made by the plaintiff which arrangements are already at all advanced stage which the defendants are aware of.

g) In the circumstances, it is in the interest of justice and fairness that the prayers sought herein are granted.

3. In the affidavit in support of the Notice of Motion, the plaintiff depones that she has repaid a substantial part of the loan but was faced with financial difficulties and was unable to repay the entire loan as was expected. The plaintiff further depones that to offset the debt, she proposed a new payment plan of an amount that she was able and comfortable to pay every month but the 1st defendant is yet to respond to that proposal. The plaintiff further avers that she fears that there is a collusion between the defendants' officers to sell the suit property at a throw away price, an act that will cause her a great loss.

4. The applicant submitted that she has met the threshold for granting of temporary injunctions as set out in the celebrated case of GIELLA –VS- CASSMAN BROWN & COMPANY LTD. It is the applicant's contention that the annexures and bundle of documents provided are enough to demonstrate that the defendants' conduct are oppressive to the plaintiff in that, despite the plaintiff having made elaborate arrangements to make payments so as to offset the outstanding loan and notifying the defendants of the same, the 1st defendant went ahead and instructed the 2nd defendant to sell the suit property. The applicant submitted that she has been able to show a prima facie case with a probability of success and that unless restrained by an order of the court, the defendants will proceed with the intended sale which act will scuttle the arrangements already made by the plaintiff to pay the outstanding loan. The applicant further submitted that the suit property is worth over Kshs.3,000,000.00 but he 2nd defendant had placed a minimal reserve price and if the intended sale is allowed to proceed, the applicant will suffer great loss considering that she has made substantial payment towards repaying the said loan.

On the principle of balance of convenience the applicant submitted that it is in the interest of justice and fairness that the orders sought herein be granted as prayed.

5. The defendants opposed the plaintiff's application. The 1st defendant filed a Replying Affidavit sworn by Faith Onyango on 20th December 2016. It is deponed that the plaintiff was granted a loan of Kshs.1,000,000.00 by the 1st defendant as working and fixed capital. The 1st defendant avers that as per the terms and conditions of the letter of offer and loan agreement, the plaintiff was required to repay the loan in 36 equal installments of Kshs.34,665.00. That the plaintiff only repaid the requisite installments for the first 10 months since the disbursement of the loan and other and insufficient payments making a total of repayments of Kshs.461,000.00 and leaving a balance of Kshs.884,656.94 as at 28th November 2016, which amount continues to accrue interest and other charges. The 1st defendant avers that the plaintiff's proposal to vary the terms of repayment of the loan is irregular, illegal and contrary to the agreed terms which are not subject to review or variation. The 1st defendant further states that the plaintiff defaulted in repayment of the loan and breached the terms and conditions of the loan forcing the 1st defendant to issue the requisite statutory notice as required by law and subsequently instructed the 2nd defendant to dispose the charged property by way of public auction. According to the 1st defendant, the intended sale of the said property by way of Public Auction is procedural and lawful and should not be interfered with whatsoever. The 1st defendant avers that it gave specific instructions to the 2nd defendant

not to sell the property below the reserve price, which is a clear indication that they have no intention of selling the property at a throw away price as alleged by the plaintiff. It is the 1st defendant contention that the plaintiff and the guarantors have all along been aware of their obligations and/or responsibilities under the contract and cannot avoid, vary or re-write the same using the court. The 1st defendant avers that it should be allowed to exercise its right to sale the property as per the agreed terms and conditions, the plaintiff having defaulted. The 1st defendant further avers that if the orders are granted, it will be unable to recover its loan and will suffer irreparable harm and damage, and that the plaintiff has not come to court with clean hands. According to the 1st defendant, the plaintiff's actions of instituting this suit and filing this application is a mere delaying tactic meant to defeat the 1st defendant's efforts to recover the arrears owed to it by the plaintiff.

6. It was submitted by the 1st defendant that the plaintiff's application has not met the threshold set in the case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD**, firstly, no prima facie case has been established as the plaintiff is truly indebted to the 1st defendant. It was further submitted that the plaintiff has not demonstrated the loss she stands to suffer if the orders sought are not granted, and that in any event, if any damage or loss is suffered by the plaintiff, the same can be adequately compensated by the 1st defendant. The 1st defendant submitted that balance of convenience tilts in its favour as the loan which is in arrears continues to accrue interest and other charges, putting the 1st defendant's security at risk since with time, the amount owed may exceed the value of the property.

7. The 1st defendant relied on the case of **PATRICK WAWERU MWANGI AND ANOTHER –VS- HOUSING FINANCE OF KENYA LTD (2013)** wherein Havelock J referred to the case of **OF KYANGARO –VS KENYA COMMERCIAL BANK LTD AND ANOTHER (2004) 1 KLR**, which held that: -

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must do equity. The conduct of the plaintiff/applicant in this case betrays him. It does not endear him to equitable remedies. He admitted in this court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff/applicant has not done that. Consequently, he has not done equity. In the hands of the plaintiff/applicant, a permanent injunction would wreck havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security,

the courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights.”

8. The 1st defendant also relied on the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD AND 2 OTHERS (2003) eKLR** wherein a prima facie case was defined as “a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” Further, the 1st defendant cited the case of **ORION EAST AFRICA LTD – VS- ECOBANK KENYA LTD & ANOTHER (2015) eKLR** wherein the court referred to Halsbury's Laws of England, volume 32 (4th edition) paragraph 725 which states: -

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because a mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on terms of the mortgage, the claim is excessive.”

9. I have considered the application, the affidavits on record, the submissions made and the authorities cited. I have also considered the applicable law. Has the plaintiff established a prima facie case with the probability of success? And are damages adequate remedy? If in doubt, where does the convenience lie? These are the issues I need to consider in deciding whether or not the applicant is entitled to the injunction sought.

10. There is no dispute that the 1st defendant granted a loan facility of Kshs.1,000,000.00 to the plaintiff and the said loan was secured by a legal charge over title **NO.MBWAKA.MAERENI/282**. The plaintiff admits having defaulted in repaying the loan forcing the 1st defendant to exercise its statutory power of sale. The plaintiff then files this suit and the application. The plaintiff states that she made a proposal to the 1st defendant of a new repayment plan of an amount that she would be able and comfortable to pay but the 1st defendant has not responded to that proposal.

11. The 1st defendant opposes the application as the plaintiff has defaulted in the repayment of the amounts due and the 1st defendant thereby became entitled to realize its security. In my view, there is no basis upon which the injunction can be granted. It was a term of the loan agreement that in the event of default, the 1st defendant could recall the loan immediately and the security could become enforceable. The plaintiff has defaulted and the 1st defendant has taken legal steps to recover the amount due. The plaintiff has not denied her indebtedness to the 1st defendant. The plaintiff has deposed that she is apprehensive that unless restrained by an order of the court, the defendants will go ahead with the intended sale by way of Public Auction and that this would scuttle the arrangements she has already made to repay the loan. The plaintiff further states that she is apprehensive that there is collusion between the defendants' officers to sell the said property at throw away price.

12. In my view, the 1st defendant was not obliged to respond or accept the alleged proposal made by the plaintiff as there was a specific loan agreement with express terms that bound the parties. There was also not a scintilla of evidence that the defendants have colluded to sell the property at a throw away price as alleged by the plaintiff. The advertisement was clear that the sale was going to be by way of Public Auction and that the sale was subject to a reserve price. In the circumstances, the plaintiff's fears regarding the purchase price is baseless and unfounded.

13. Accordingly, I am not satisfied that the plaintiff has established a prima facie case with a probability of success to warrant the grant of a temporary injunction. In any event, the plaintiff has not shown that damages will not adequately compensate her in the event of her succeeding in the end. I am also of the view that the balance of convenience tilts in favour of the 1st defendant who should not be hindered in its effort to recover the outstanding loan arrears which continues to accrue interest and other charges.

14. Accordingly, I find that this application is without merit and is hereby dismissed with costs to the 1st defendant

Dated, signed and delivered at Mombasa this 15th day of JUNE 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE