



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 280 OF 2016

SWEETLAND LTD.....1ST PLAINTIFF

HILARY KIPKOSGEI KIBOINETT.....2ND PLAINTIFF

VERSUS

TRANSNATIONAL BANK LTD.....DEFENDANT

RULING

The plaintiffs pray for a temporary injunction against the defendant, its servants, agents or any other person acting on its behalf from advertising for sale, offering for sale, alienating or in any other manner disposing off land parcel No. Eldoret Municipality/Block 9/1965 and L.R. No. Kiplombe/Kiplombe Block 10[Growel]837 pending hearing and determination of the suit. The application is based on grounds that the applicants' property land parcel No. L.R. Eldoret Municipality Block 9/1965 and L.R. No. Kiplombe/Kiplomber Block 10 (Growel)837 have been advertised for sale by public auction on 5th day of 2016. The applicants have not been served with the statutory notices of sale as provided for under section 90 of the land Act, 2012. The applicants shall lose their right to equity of redemption should the sale proceed as scheduled on 5th October, 2016. The plaintiffs have high chances of success in this matter. That this application is brought in utmost good faith.

In the supporting affidavit, Hillary Kipkosgei Kiboinett states that on 3rd day of October 2016, his friend informed him that his property and that of Sweetland Ltd aforesated had been advertised for sale by Purple Royal Auctioneers on the Daily Nation Newspaper which information he confirmed to be true. That neither the company nor him have ever been served by the defendant any demand notice, the 90 days' statutory notice as provided for in section 90 of the Land Act, 2012. That the Auctioneers did not serve the company and him with the 45 days' redemption notice or the notification of sale as provided for under the Auctioneers Rules, 1997 and that he is advised by his Advocate on record, which he verily believe to be true that if the sale scheduled for 5th October, 2016 proceeds, the company's 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 the company was not served with the 90 days statutory notice and the other notices, the defendants statutory power of sale has not crystallized. That he is further advised by his said Advocates on record which he verily believes to be true that the advertisement of their property for sale without following the due process is illegal, null and void.

That he is further advised by his said learned Advocate on record, which he verily believe to be true that it was incumbent upon the defendant to serve the statutory notices on all the interested parties in land L.R. No. Eldoret Municipality Block 9/1965 and L.R. Kiplombe/Kiplombe Block 10{Growel)837. That the company and him shall suffer injustice and irreparable loss if the sale proceeds as scheduled. That the land parcel L. R. No. Eldoret Municipality Block 9/1965 and L. R. No. Kiplomber/Kiplombe Block10

(Growel)837 is his home and company's respectively. That it is only mete and fair that the orders sought herein be granted.

The respondent through Wilson Ruto is the Branch Manager Officer of the defendant's Eldoret branch and having the authority of the bank to make the affidavit in response to the supporting affidavit filed a replying affidavit stating that the 1st plaintiff borrowed loan facilities of Kshs.68,000,000 on 14th November, 2014 as shown in the offer letter and that the directors of the 1st plaintiff offered land parcels numbers Kiplombe/Kiplombe Block 10(Growel) 187 in the name of the 1st plaintiff and Eldoret Municipality/Block 9/1964 in the name of the 2nd plaintiff as security and charge both properties in favour of the bank for the sum of Kshs.50,000,000/= and Kshs.18,000,000/= respectively. That on 9th September 2015, the bank issued a demand letter to the plaintiffs where the plaintiffs were required to repay the total of Kshs.72,419,087.45. That the plaintiffs failed to respond to the demand letter and the bank proceeded to issue 3 months statutory notices through its lawyers. That in apparent response to the statutory notices, the plaintiffs' company wrote the letter dated 1st August, 2016 and proposed to pay Kshs.50,000,000/= within 14 days of the said letter. That the plaintiffs failed to repay the loan and the defendant proceeded to instruct auctioneers who subsequently proceeded to issue the notices under the Auctioneers Rules. That the plaintiffs presently owe the defendant in excess of 90 million and the amount continues to accrue interest.

According to the defendant, the plaintiffs were properly served with all the requisite statutory notices, consequently the suit and application are without basis and indeed untenable. That the plaintiffs' application is without merit for reasons that there is no prima facie case with probable chances of success. The properties charged were offered for sale in the event of default hence no irreparable damage can rise. The plaintiffs admit liability for the debt and do not deny indebtedness to the defendant, hence balance of convenience tilts in favour of the defendant. That the defendant is perfectly entitled to exercise its statutory power of sale as all statutory requirements have been duly complied with. That the plaintiffs' application is an abuse of the process of court as same is intended to delay recovery of huge debt of over 90 million.

The gravamen of the applicant's submissions is that the defendant herein advertised for sale the suit properties without issuing a statutory notice to the applicant as required under Section 96 of the Land Act. The applicant submits further that before exercising the power of sale, the charge shall serve on the charger a notice in the prescribed form and shall not proceed to complete any contract for sale of the charged land until the notice has lapsed. According to the plaintiff, the notice was not served. On damages, it is argued that the damages will not be adequate to compensate the plaintiff.

Moreover, the applicant argues that the arrears highly inflated. On balance of convenience, the applicant argues that it tilts in favor of the applicant as the applicant has been repaying the loan and that the rental premises are sufficient to repay the loan and that the defendant will not suffer any prejudice as he is charging interest on the loan.

Lastly, that the value of the property is appreciating and therefore, the defendant will not suffer any prejudice if injunction is granted because if the defendant succeeds, he will be able to dispose the property whose value would have appreciated.

I have considered the submissions on record and as is the practice in such cases in applications for temporary injunction, the power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) Whether the applicant has demonstrated a prima facie case with a probability of success.**
- 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.**
- 3) Where the balance of convenience tilts if the court is in doubt.**

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted to him. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. **Irreparable injury** means that the injury must be one that cannot be adequately compensated for in damages the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

On prima facie case, it is important to establish whether notice was granted or rather whether the law was complied with. I have looked at the letter of offer dated 4.11.2014 and formal demand letter dated 9.9.2015. I have gone through the affidavit and do not see a statutory notice of sale. Section 96 of the Land Act provides that a statutory notice of sale of 90 days should be issued before the sale. The defendants have not demonstrated that this notice was issued. I do find that the plaintiffs have established a prima facie case with a probability of success in the absence of notice.

On whether damages, can be adequate to compensate the plaintiff if he succeeds, I do find the premises being rental properties, damages will not be adequate as the property appreciates in value and that the plaintiff is entitled to the rent, pending hearing and determination of the suit. Balance of convenience tilts towards granting the injunction as the plaintiff will be more inconvenienced if the property is sold as he will lose the rental income. Ultimately, the application is allowed.

DATED AND DELIVERED AT ELDORET THIS 15th DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE