



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 357 OF 2015

REMMY K. SANG.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

SOSIANI COMMUNITY DAIRY.....2ND DEFENDANT

KIMELI KORIR.....3RD DEFENDANT

DANIEL SAWE.....4TH DEFENDANT

JONAH KENY.....5TH DEFENDANT

PHILEMON BITOK.....6TH DEFENDANT

DAVID TOROREI.....7TH DEFENDANT

JACKSON RONO.....8TH DEFENDANT

SUSAN KOSGEL.....9TH DEFENDANT

DAVID KOECH.....10TH DEFENDANT

KIPCHUMBA KORIR.....11TH DEFENDANT

ABRAHAM MAIYO.....12TH DEFENDANT

NEW KENYA CO-OPERATIVE CREAMERIES.....13TH DEFENDANT

RULING

Remmy K. Sang, (hereinafter referred to as the plaintiff/applicant) has come to court against the defendants seeking for orders that the plaintiff be granted a temporary order of injunction restraining the 1st defendant, its agents, servants or anybody acting on their behalf from in any way selling by way of public auction or disposing or otherwise interfering with the title of the suit property described as

Nandi/Ndubeneti/476, pending the hearing and determination of the suit and that the honourable court be pleased to compel the 1st defendant to discharge and release his title deed to his property described as Pioneer/Ngeria/Block 1 (EATC)/12206.

The application is based on grounds that the plaintiff has cleared the loan facility whilst the 1st defendant has declined to discharge the collateral on grounds that the plaintiff is responsible for offsetting the loan facility offered to the 2nd defendant. The 1st defendant has recalled the loan facility without involving the principal debtor. The plaintiff is apprehensive that the 1st defendant will sell the property for a lower value. The property is matrimonial and ought to be preserved.

The 1st defendant filed a replying affidavit whose gist is that the 1st defendant advanced to the 2nd defendant Kshs.5,071,000/= secured by 3rd party charge in favour of the 1st defendant over property title No.Nandi/Ndubeneti/476 registered in the name of the plaintiff. The plaintiff executed a deed of guarantee and indemnity over the said facility. The loan was disbursed on 26.1.2013 and is currently outstanding at Kshs.4,787,118.94. The 2nd defendant has defaulted and that the statutory 3 months' notice was sent and that the 2nd defendant failed to regularize and therefore, redemption notice as sent. The plaintiff is aware that the 2nd defendant has defaulted and therefore, the application should be dismissed.

Mr. Remmy K. Sang filed a further affidavit stating that the loan secured was made to Sosiani Community Dairy Farmers Group. He guaranteed Sosiani Community Dairy Ltd. He states that the letters dated 16.2.2015 and the list of registered postal parcel were addressed on the premise of loan owned to Sosiani Community Dairy Farmers Group not a limited liability company and that the title originally was Nandi/Ndubeneti/476 and not any other property.

The loan was advanced to Sosiani Community Dairy Group and not Sosiani Community Dairy Ltd and therefore, the instruction to sell the property is a nullity. The 13th respondent contends that he was wrongly sued as there is no claim against him.

In a supplementary affidavit filed on 23.1.2016, Anthony Ouma states that the offer letter has both the names of Sosiani Community Group Ltd and Sosiani Community Dairy Limited and that Sosiani Community Dairy Ltd received the facility that was guaranteed by the plaintiff and that the plaintiff and 1st defendants were served with notification.

The plaintiff submits that the loan was made to Sosiani Community Dairy Farmers Group and not Sosiani Community Dairy Ltd and that the principal borrower is Sosiani Community Dairy Farmers Group. There is a legal charge on Nandi/Ndubeneti/476 and a personal guarantee and indemnity by all the directors of Sosiani Community Dairy Ltd. The plaintiff submits further that he has established a prima facie case with a probability of success. He alleges misrepresentation of facts. Moreover, that 1st defendant has refused to release his property. On the issue of irreparable harm which cannot be compensated by way of damages, the plaintiff states that the defendant may be evidenced with money being a financial institution but that does not mandate the 1st defendant to bully the plaintiff to submission. On balance of convenience, the plaintiff submits that since the 1st defendant has breached express provisions of the harm, injunction should be granted.

The 1st defendant submits that the plaintiff has failed to demonstrate that there is a prima facie case with a probability of success as he has not demonstrated that he is not indebted to the 1st defendant as a guarantor. According to the defendant, the borrower secured a guarantor who has defaulted and is liable for Kshs.4,787,118.94 as at 31.8.2015. Moreover, that the procedure in the recovery of the loan was adhered to. The defendant further submits that the plaintiff has not demonstrated that he will suffer irreparable harm as he can be adequately compensated in damages. The plaintiff should have contemplated that the property would be sold if he defaulted. On a balance of convenience, the defendant argues that it tilts hands dismissing the application and that the bank should be allowed to release its security. That the gist of the orders will greatly prejudice the defendant as the debt will grow.

I have considered the evidence on record and do find that the first issue to be determined is who is the borrower of the loan; Is it Sosiani Community Dairy Farmers Group or Sosiani Community Dairy Ltd. On the 11.8.2011, the 1st defendant offered the directors of Sosiani Community Dairy Ltd of P. O. Box 3435 – 30100, Eldoret a loan of Kshs.5,071,000/=. The security of the loan, was the original title deed and a first legal charge over parcel L.R. No. Nandi/Ndubeneti/476 to be registered in the name of Remmy Kiprotich Sanga. The directors of Sosiani Community Dairy Ltd accepted the offer and the terms and conditions. The plaintiff agreed to guarantee the loan and charged his property L.R. No. Nandi/Ndubeneti/476. It appears that the loan was issued to the company known as Sosiani Community Dairy Limited. However, the account for the secured loan is in the name of Sosiani Community Dairy Farmers Group and not the Sosiani Community Dairy Farmers Ltd. The charge and deed of guarantee indicate that the borrower was Sosiani Community Dairy Ltd of P. O. Box 40 – 30100. The letter dated 16.2.2015 being the statement notice indicated that the money in dispute was advanced to Sosiani Community Dairy Farmers Group.

I have also discerned the account availed by the 1st defendant and do find that the same is not for Sosiani Community Dairy Farmers Ltd but it is for the Sosiani Community Dairy Farmers Group. It is not clear whether the 1st defendant advanced money to the group or to the company. It is clear that the group is a legal entity. Moreover, it is clear that the company exists. It is not clear whether the money borrowed by the company or by the Self-help group all these facts will come out at the hearing of the suit. The second issue revolves on who was referred to as the borrower in the letters addressed to the plaintiff. I have looked at the statutory notice and do find that it refers to the group as the borrower and not the company. This court finds that it is important to establish who borrowed the money; whether it was the company of the group and therefore, on the ground alone, the court finds that the plaintiff has a prima facie case with a likelihood of success as the company is a person with the capacity to sue and be sued in his own name and with the capacity to borrow. The self-help group also has its legal mechanisms and therefore, it is important to establish who was guaranteed by the plaintiff. On the issue of irreparable harm, I do find that the plaintiff has not demonstrated that he will suffer any irreparable harm that cannot be compensated by the 1st defendant as the 1st defendant is a financial institution that is capable of paying the damages where the plaintiff succeeds in his case.

However, this case has to be determined on a balance of convenience, thus, who is likely to be inconvenienced if the injunction is granted. On this part, I do find that since there is a lot of confusion as to who borrowed the money, it would be prudent to issue an order of status quo as the plaintiff is likely to lose his property due to confusion between the company and the self-help group whilst the defendant can recover his money from either the company or the self-help group.

The upshot of the above is that the application is dismissed.

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

A. OMBWAYO

JUDGE