



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 161 OF 2016

SAMUEL MWAURA NDORONGO.....PLAINTIFF/APPLICANT

VERSUS

RAFIKI MICRO FINANCE BANK LIMITED DEFENDANT/RESPONDENT

RULING

Samuel Mwaura Ndorongo (hereinafter referred to as plaintiff) has come to court for an interlocutory injunction against **Rafiki Micro Finance Bank** restraining it whether by itself, its servants and/or agents from selling or transferring and evicting the plaintiff from occupation of the land parcel known as Eldoret Municipality/Block 21(King'ong'o)/4388 pending the hearing and determination of the suit. The application is based on grounds that the plaintiff has a prima facie case with the probability of success and that damages shall not be an adequate remedy and lastly, that the balance of convenience tilts in favour of the plaintiff.

The application is supported by the affidavit of Samuel Mwaura Ndorongo who states that the defendant advanced a loan to Willy Gichanga Gachoka and that the plaintiff guaranteed the said loan by charging the land parcel known as Eldoret Municipality/Block 21 (King'ong'o) 4388. That all along he has been assuming all is well between the defendant and the principal debtor. That however, on the 13th June 2016, he received a letter from M/s Mulanya & Maondo Advocates indicating that his land would be sold due to the default of the principal borrower. That to his utter shock, he learnt that the defendant was in the process of carrying out the charge statutory power of sale. That the suit land is their matrimonial property and he has a wife and several children who stay at home on that property. That the sale of the land was bound to take place in the 16th June, 2016 by either a public or private contract to his detriment.

That the sale of the land is improper for the following reasons namely;

- (a) No name of the charge who claims default has been disclosed in the notice.***
- (b) No amount stated in which is required to remedy the default is stated.***
- (c) No advertisement of the property has been placed in the newspaper as required by law.***
- (d) No statutory notice was ever served by the defendant upon him as required by law.***
- (e) No valuation of the property has been carried out.***
- (f) No spousal consent was sought and granted prior to the charge transaction.***

(g) The equity of redemption is being clogged.

(h) No exercise of exhaustion of alternative remedies has been carried out prior to resorting to sale of the collateral.

The plaintiff states that damages shall not be an adequate remedy as family shall be displaced by the sale. The applicant states that the balance of convenience would tilt in favour of maintaining the status quo as he is in occupation with his family and that the chargee ought to have exercised any other remedies prior to resorting to the power of sale. That he has contacted the principal debtor who has informed him that he is waiting for money from a transaction he carried out to enable him regularize payment of the loan and that due to the collapse of Chase Bank an affiliate of the charge, the principal borrower was confused since there was information that of non-operation of the charge.

The respondent filed a replying affidavit sworn by Jane Warau, the head of Debt Recovery Unit for the defendant stating that she wishes to start by enumerating the facts therein which in their opinion are not in dispute being;

(a) That it is not in dispute that the respondent advanced a loan to one Willy Gichanga Gachoka.

(b) That it is not in dispute that the applicant guaranteed the said Willy Gichanga Gachoka the loan and as a collateral, charged his parcel of land known and registered as Eldoret Municipality Block 21 (Kong'ong'o) 4388 to the respondent.

(c) That it is not in dispute that the borrower, Willy Gichanga Gachoka has defaulted in repayment of the loan.

(d) That the applicant was to guarantee the repayment of the loan and all other monies accruing thereon by the borrower.

(e) That it is not in dispute that by offering his land parcel Eldoret Municipality Block 21 (King'ong'o) 4388 to the respondent as security for the loan advanced to the principal borrower, the applicant understood his obligation as a guarantor and as a charger.

The respondent alleges that sometimes in the month of September 2014, the principal borrower, Willy Gichanga Gachoka defaulted in repayment of the loan advanced to him by the defendant/respondent and to recover the loan, the defendant instructed their advocates on record M/s Mulanya & Maondo Advocates to proceed and issue necessary notices to both the borrower and the charger. Their Advocates have advised that on 8th October, 2015 and 12th January 2016, they issued 90 days' statutory notices to the borrower and the charger respectively and that both the borrower and the charger did not respond to the said Notices as required, where after, their advocates issued the 40 days' notice as required under Section 96 of the Land Act. According to the deponent, the fact that the loan is still outstanding, the defendant is right to proceed and carry out the Chargee's statutory power of sale. The applicant signed an affidavit attached to the charge to confirm that; "he did not require the consent of a spouse or family or community member in order to charge the property."

The defendant/respondent, has followed due procedure in carrying out the chargee's statutory power of sale by doing the following:

(a) On 8th October, 2015 and 12th January 2016, 90 days statutory Notices were sent out by registered post to both the borrower and Charger.

(b) That upon the lapse of 90 days, the 40 days' Notice were issued to the charger and borrower by registered post to their last known address.

(c) That the default amount was fully disclosed in all notices sent to the charger and principal borrower.

(d) That the plaintiff through an affidavit sworn on 27th March 2014, deponed that he did not require the consent of a spouse, family or community member to charge his parcel of land for the loan advanced to Willy Gichanga Gachoka by the defendant.

(e) That the process of advertisement and valuation would only follow upon expiry of the 40 days' Notice.

That considering the above set of facts, it is very clear that the defendant followed the required procedure while carrying out the process of chargee's statutory power of sale. She avers that the defendant is entitled to recall the debt and commence the realization process as both the Chargor and the borrower have failed to perform their obligation of paying the monies due.

Moreover, the plaintiff, as the guarantor has not stated in his suit paper how he intends to clear the default herein in order to salvage his charged property hence the suit as filed is a pure abuse of the court process and only meant to scuttle the defendant's legal process of realization of the security through chargee's statutory power of sale process.

At the time of offering his property as security, the applicant was well aware of the fact that the same would be realized in case of default and that is a cause of action that is always anticipated by a guarantor in case of default on the part of the borrower. That there is no any other remedy available to the chargee in the event of default by a chargor other than the chargee's statutory power of sale as stated in paragraph 15 of the supporting affidavit. The defendant is a separate legal entity from Chase Bank hence it has never stopped its operations. In any event, the applicant has never approached the respondent to find out if the loan is being serviced by the Principal borrower he had guaranteed.

The defence by the applicant that the charged property is matrimonial property is not available to him as he had presented a sworn affidavit stating that he did not require consent of a spouse, family member or community to charge the property. That the affidavit attached to the signed charge by the plaintiff was not sworn by him through coercion, undue influence and/or intimidation but the same was sworn by him on his own volition.

It is therefore important that this honourable court compels the plaintiff to perform his legal and statutory obligations as a guarantor hence the suit together with the application filed herein should be frowned upon by this honourable court.

Considering the facts herein, it is their humble prayer that the defendant's suit is a complete abuse of the court process, does not raise any triable issue and that the same was filed in order to scuttle the defendant's process of realization of the security herein.

The ***gravamen*** of the plaintiff's submissions is that the applicant was never served with the statutory notice and therefore the respondent never complied with the provision of Section 90 of the Land Act, 2012. The applicant further argues that the respondent did not comply with Section 96(1) of the Land Act, 2012 and that no spousal consent was obtained before the charge was executed. Lastly, that no valuation was carried out.

The defendant on the other hand submits that the plaintiff has not established a prima facie case with a likelihood of success as he signed the charge documents and therefore, the court cannot re-write the agreement for the parties. Moreover, that the plaintiff has not demonstrated irreparable damage as having put his land as security for the 2nd defendant loan he commoditized the land. On balance of convenience, the defendant submits that the defendant will lose the investment which was afforded to Willy Gichanga Gachoka.

I have considered the evidence on record and do find that the defendant seeks to prove that he complied with Section 90(1) of the Land Act, 2012 by issuing the statutory notice. I have seen the postal corporation of Kenya, Nairobi, PIN P051128734A, payment receipt number MOO100-05160341241 dated 10.3.2016 at 13.04 served by Joan Kariuki (16) in respect of a domestic letter destined for Eldoret

(30100) Iten No. Wt: RD104300082 KE (20 gms) postal of a fee of Kshs.35 and registration fee of Kshs.50 totalling to Kshs.85 sent by Mulanya & Maondo Advocates to Samuel Mwaura. I am not convinced that the plaintiff was served with the statutory notice as the statutory notice is dated 12.1.2016 and was drawn by the firm of Mulanya & Maondo Advocates Ltd and received by the defendants on 14.1.2016. How comes it was sent on 10.5.2016 according to the applicant's evidence? There is a likelihood that what was being sent was not the statutory notice as the delay of approximately 4 months is not explained.

JW3 is not properly drafted as a redemption notice as it does not clearly specify the period of compliance and it states that the compliance should be immediate. Moreover, it is not clear as to how the redemption notice was served as receipt dated 3.6.2016 is no evidence of service of the redemption notice.

On the issue of spousal consent, I do find that the plaintiff has not given any evidence that he has a spouse. The said spouse has not sworn any affidavit that her consent was required but was not obtained.

Lastly, I do find that it was necessary to value the property. This was not done. Consequently, I do find that the plaintiff has satisfied this court that he has a prima facie case with a possibility of success. However, the court finds that, basically, the issue revolves on procedure and not substance and therefore I do order that the defendant restart the process of exercising his statutory power of sale and do comply with the law. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF JULY, 2017.

A. OMBWAYO

JUDGE