



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 65 OF 2016

TACHASIS WHOLESALERS CO. LTD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

Tachasis Wholesalers Co. Ltd (*hereinafter referred to as the Plaintiff*) have come to court against **National Bank of Kenya Ltd (*herein after referred to as the defendant*)** and do pray for a permanent injunction restraining the defendants, its agents, servants and/or auctioneers from interfering, selling, disposing, offering for sale by way of public auction or private treaty or dealing in any way detrimental to the right of the Plaintiffs in respect to the suit parcel of land being Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20/38. The Plaintiff also prays that the defendant do supply the Plaintiff with certain documents.

The application is based on the grounds that the Plaintiff/Applicant is not the lawful/registered proprietor of all that parcels namely Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 save for Eldoret Municipality Block 20/38 (Kapyemit) 20/38 and yet the defendant/Respondent has served the Plaintiff/Applicant with a Notification of Sale with respect to lease properties namely Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20/38 with an intention to sale through a public auction or private treaty. That the Plaintiff/Applicant as a legal entity has neither applied for any credit facility nor has it been advanced any loan from the Defendant/Respondent. Moreover, that the charged properties are not owned by the Plaintiff's/Applicant. Neither the Plaintiff/Applicant has been a guarantor to the charged properties nor borrowed any monies from the Defendant/Respondent.

It is therefore in the interest of justice that this honorable court does issue the sought orders to enable this court arrive at a just decision and to avoid miscarriage of justice. The defendant cannot suffer any loss which cannot be compensated by way of damages. That this application has been brought promptly and in utmost good faith.

In the supporting affidavit, the plaintiff denies ever having applied for credit facilities and therefore is a stranger to the defendants claim. According to the plaintiff, the Notice of Sale was issued to the wrong person moreover that the Statutory Notice was not issued as required by law. In a nut shell, the plaintiff states that he is not indebted to the defendant. The defendant filed a replying affidavit indicating that the outstanding loan amount to Kshs.42,826,897. The defendant has shown by affidavit that parcels of land Nos. Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20/38 registered in the names of Hassan Kiptoo Koskey and Tachasis Wholesalers Co. Ltd were charged as securities to the loan. The legal charges have not been discharged. The defendant states that he granted a loan to the Plaintiff and has annexed pleadings in the lower court where the plaintiff

admitted having received a loan from the defendant. The defendant states that the plaintiff is praying for injunction in respect of suit properties that do not belong to it.

I have considered the application, affidavits and heard oral submissions by counsel and as in the practice in such cases the basic principle is that the plaintiff has to satisfy the court that he has a prima facie case with the probability of success and that if an injunction is not issued he is likely to suffer irreparable harm and that if the court is in doubt then it should consider the balance of convenience.

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.

In *Mary Ariviza and Okotch Mondoh Versus the Attorney General of The Republic of Kenya And the Secretary General of The East African Community*. In the East African Court of Justice First Instance Division at Arusha Before *Johnston Busingye Pj, Stella Arach-Amoko Dpj, John Mkwawa J, Jean Bosco Butasi J, Benjamin Kubo J*) Application No. 3 Of 2010 (Arising From Reference No. 7 Of 2010) in a ruling Of the Court Dated 23rd February, 2011 the learned judges held that the granting or refusal of a temporary injunction, which is an interlocutory order, is an exercise of judicial discretion which must be exercised judiciously. Three, conditions for the grant of an interlocutory injunction are now well settled in East Africa: -

- (a) an applicant must show a prima facie case with a probability of success;*
- (b) 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;*
- (c) If the court is in doubt, it will decide an application on the balance of convenience.*

The honorable judges held that: -

“At this stage, we must of course refrain from making any determination on the merits of the application or any defense to it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference. Consequently, we are satisfied that the Applicants have crossed over the first hurdle.”

On the issue as to whether the plaintiff has established a prima facie case with a likelihood of success, this court finds that the plaintiff denies having applied for a loan and received one. This is a very serious allegation that the plaintiff never applied for any loan facility from the defendant and that the defendant

never advanced any loan facility to the plaintiff. It was incumbent upon the defendant to file a replying affidavit attaching the application for loan when it was approved and the grant of the loan. The Defendant has not disputed the plaintiff claim that he never applied for a loan instead the defendant has shown that the property is charged. The plaintiff states that there was no Notice pursuant to Section 90 of the Land Act. This fact is not disputed as the defendant has not responded to the allegations. There being no letter of offer and acceptance shown to court vide affidavit and the defendant having failed to establish that he complied with Section 90 and 96 of the Land Act, I do find that the plaintiff has established that he has a prima facie case with a likelihood of success.

On the issue of irreparable harm that cannot be adequately compensated with damages I do find that the defendant has not established that he can compensate the plaintiff if the suit succeeds when the property would have been sold by auction. Since the court is not in doubt, the issue as to the balance of convenience does not apply. The application is allowed thus a temporary injunction restraining the defendants, its agents, servants and/or auctioneers from interfering, selling, disposing, offering for sale by way of public auction or private treaty or dealing in any way detrimental to the right of the Plaintiffs in respect to the suit parcel of land being Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20/38 pending the hearing of the suit.

Dated and delivered at Eldoret on this 14th day of July, 2017.

A. OMBWAYO

JUDGE