



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 102 OF 2016

MARTIN JUMA NAIBEL.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1STDEFENDANT

KOLATO AUCTIONEERS.....2NDDEFENDANT

JOSEPHAT MERILIMA LOMOKEL.....INTENDED 3RDDEFENDANT

R U L I N G

1. The plaintiff allowed a loan facility of **Kshs.600,000/=** issued by the 1st defendant to the intended 3rd defendant, to be secured by a legal charge registered over the plaintiff's land known as **Kiminini/Kinyoro Block 4/Rafiki/110**.

2. Now the plaintiff has filed an application to enjoin the intended 3rd defendant to the suit on the ground that the loanee has without any justifiable cause defaulted in the repayment of the loan issue to him by the 1st defendant; that the loanee has property which can be disposed of and the proceeds used to defray the loan monies, yet the chargee has threatened to sell the charged property in exercise of its statutory power of sale.

3. I have considered the application and the reply and the applicant's submissions. The 1st respondent filed grounds of opposition but filed no submissions. The 2nd respondent never replied nor filed submissions.

4. The instant application was filed after the application seeking to injunct the defendants from disposing of the charged property was dismissed by this court on **10/10/2016**. The charge document is annexed to the affidavit of Doris Rono filed on **1/7/2016** in reply to the interim injunction application. The deed of guarantee and indemnity is also exhibited in that affidavit. I agree with the defendant's ground that the charge arrangement between the 1st defendant and the plaintiff to offer the suitland as security for a loan to the loanee is a voluntary contract which the court cannot and should not be asked to rewrite.

5. The applicant however submits that under **Order 1 Rule 10(2) of the Civil Procedure Rules**, the court has power to enjoin any person to proceedings by order either of its own motion or at the instance of a party. That is so where the presence of that person before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. I find no direct involvement of the intended defendant in the charge or the guarantee to warrant any orders sought.

6. An examination of the plaint and the defence does not reveal any claim against the intended defendant. The plaintiff's prayers are purely against the defendants. It is quite evident that the plaintiff never thought of including any claim against the intended defendant in the first instance. The defendants themselves have no need to enjoin the intended defendant as their loan facility to him is covered by the security that the plaintiff offered. However the application at hand seeks to amend the plaint to include some claim against the 3rd defendant as follows:-

“An order compelling the 3rd defendant to pay the loan owed to the 1st defendant and/or provide another security, thereof in place of the plaintiff's title.....which is currently used as security; or in the alternative an order compelling the 3rd defendant to compensate the plaintiff for all the losses (sic) that the plaintiff has sustained and/or shall sustain as a result of the 3rd defendant's default in repaying the loan advanced to him by the 1st defendant”.

7. To this court, the proposed amendments would change the nature of the suit from one meant to purely forestall the realization of the security by the defendants to one in which the plaintiff is claiming indemnity from the intended 3rd defendant as well.

8. Let's examine what would be likely to occur if the application at hand was declined: There is possibility that the plaintiff may settle the indebtedness due to the 1st defendant and redeem his property. If this happens, then the plaintiff may, depending and I hereby stress the word *depending*, lodge a claim against the intended 3rd defendant for indemnity. That would mean increased litigation, which would still need to be dealt with by this court. I am aware that the plaintiff's first application in this suit seeking an interim injunction against the defendant was dismissed. No information is forthcoming from the plaintiff as to whether as at the time of urging this application the security has been sold.

9. Irreparable loss would not be a good ground upon which to grant the application at hand. However, avoidance of multiplicity of suits is. In addition the proposal to claim indemnity from the intended 3rd defendant is. However foresight demands that consideration be taken of the practicality of the process of claiming for indemnity in this particular suit. Damage has not been inflicted upon the plaintiff yet. Only threat of damage is claimed. The security has not been realized yet. The plaintiff has not paid the loan sums yet.

10. In other words, orders made in respect of the second limb of prayer **No. (b)** of the amended plaint would be in respect of future damage whose quantum is yet unknown. Orders made in respect of prayer **No. (a)** of the amended plaint would also not be final but would be dependent on the amenability of the defendants to proposed change of contractual relations between them and the plaintiff, and willingness of the intended 3rd defendant to provide other security, and probably the land control board processes, and valuation processes. Those proposed orders would also be subject to other hitherto unforeseen factors as to the value of the fresh security to be offered, the costs of valuation and registration, the waiting period, legal fees, et cetera.

11. The question that now arises is: is it just to drag the current defendants through all that process when the 1st defendant had, to the best of his ability, ensured that the 3rd intended defendant provided security before it disbursed the loan sums to him, even if the security belonged to the plaintiff? The reasons as to why the parties settled on the plaintiff's land to be the security while the intended 3rd defendant had valuable property that could have been similarly used are best known to the parties themselves.

12. The upshot of the foregoing is that this court cannot grant the application dated **10/2/2017** without considering the proposed prayers in the proposed amended plaint, and the probability of success of such claim against the intended 3rd defendant or other consequences of such process. The court must also consider the probability of bringing claims in any suit to a final end without any unnecessary resort to supplementary proceedings to be made after the judgement is delivered, as is likely to happen if the intended 3rd defendant is enjoined herein.

13. In this case the court foresees no possibility of a quick final end to litigation arising out of the joinder of the intended 3rd defendant. In matters of this nature, though prevention of multiple litigation may be a necessity, where it is necessarily foreseeable that joinder of an additional party would drag the proceedings interminably, notwithstanding the provision of Order 1 Rule 10(2) of the Civil Procedure Rules it would be unjust for the court to burden the existing parties who have nothing to do with the plaintiff's claim for indemnity from the intended 3rd defendant, with such a protracted process. I find no good ground upon which to grant the application dated 10/2/2017. The same is hereby dismissed. The plaintiff shall bear the costs of the application.

Dated, signed and delivered at Kitale on this 24th day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

N/A for both parties

COURT

Ruling delivered in open court in the absence of both parties who had been notified.

MWANGI NJOROGE

JUDGE

24/8/2017