



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO.109 OF 2017

NAHASHON KIMTAI METTO.....1ST PLAINTIFF

VERSUS

AGRICULTURAL FINANCE

CORPORATION.....1ST DEFENDANT

BENJAMIN KUSOI SILA

T/A LEGACY AUCTIONEERS.....2ND DEFENDANT

R U L I N G

1. The plaintiff's application dated 20/6/17 seeks the following orders: -

(1) That this application be certified as urgent and service in the 1st instance be dispensed with.

(2) That while pending the *inter-partes* hearing and determination of the application herein, this Honourable Court be pleased to issue a temporary injunction restraining the defendants herein, their agents and servants from selling by public auction or in any other manner on the 23/6/2017 at Kitale Town or in any other place the plaintiff/applicant's land comprised in Title No. Kwanza/Kwanza Block 5/Korosi/114.

(3) That upon *inter-partes* hearing, the temporary injunction be confirmed while pending the hearing and determination of the pending suit.

(4) Costs be provided.

2. The Applicant's case as seen from the plaint is that he is the owner of **LR No. Kwanza/Kwanza BK5(Korosi)114**; that he borrowed a loan of **Ksh.198,000** from the 1st Defendant on **12/2/2009**; that he charged the suit land as security for the loan; that he paid the sum of **Ksh.150,000/=** to the 1st Defendant leaving a balance of **Ksh.48,000** but the 1st defendant has not given an account to the plaintiff showing the status of the loan interest and other charges; that the 1st defendant has never served the plaintiff with a 90 days' Notice before purporting to exercise its statutory right of sale; that the plaintiff believes that the 1st Defendant should sell only such portion of the land allegedly worth in excess of **Ksh.15 million**; that without serving the plaintiff with a **45 days** redemption Notice and Notification of sale the defendant caused the plaintiff said land to be advertised for sale; that from the Notification of sale availed by the 1st

defendant the plaintiff's land was valued at **Ksh.8,700,000/=** and the forced sale value was estimated at **Ksh.6,525,000/=** while the outstanding debt as at **31/6/2017** was put at **Ksh.409,410/=** and auctioneers charges put at **Ksh.450,000/=**.

3. The plaintiff avers that it would be unconscionable to auction the whole of the plaintiff's land parcel while even one acre of the land would realize more than the amount owed to the 1st defendant. On that basis, he pleads that the intended sale of the land is illegal and in bad faith and he seeks a permanent injunction an order that the 1st defendant do render an account to the plaintiff correctly showing the outstanding sum.

4. The application is opposed. Mr. John M. Kithinji, a legal officer of the 1st Respondent swore an Affidavit on **22/6/17**. In the Replying Affidavit he avers that the plaintiff was lent by the 1st defendant **Ksh.198,000/=** for purchase of "growing 18 acres" of maize which sum was to be repaid in full with interest and costs within a period of one year and **LR No. Kwanza/Kwanza BK 5/Korosi/114** was used as security. A notification of charge was registered upon the suit property to secure this sum, interest and costs. The plaintiff failed to repay as agreed.

5. The 1st defendant then **21/6/10** and **28/10/13** served the plaintiff demands to pay the outstanding sum, then standing at **Ksh.230,064.08** at **18/6/10**. Then the 1st defendant issued a statutory notice to the plaintiff dated **22/11/2010** recalling the outstanding sums in full together with interest thereon.

6. The deponent alleges that the plaintiff received the statutory notice and visited the 1st defendant's offices in Kitale on **28/5/2014** where he pleaded for more time to repay the loan, but the proposals of **Ksh.30,000/=** and **Ksh.70,000/=** installments were not acceptable to the 1st respondent. It is due to the plaintiff's continuing default that the 1st defendant instructed the 2nd defendant to dispose of the suit property to realize the sums due.

7. The 1st respondent avers that the 2nd respondent served a **45 day** redemption Notice and a Notification of sale over the suit land upon one Jeremiah Kimtai who identified himself as the son to the plaintiff which mode of service the 1st defendant deemed legally appropriate subsequently the property was advertised for sale in print media and posters.

8. The valuation of the property, the deponent further avers, was carried out in the presence of the plaintiff. The deponent exhibits in the replying affidavit copies of the loan offer dated **12/2/2009**, certificate of acceptance signed by the plaintiff dated **3/3/2009**, the Notification for charge, dated **12/2/2009** demand notice dated **21/6/2010**, final demand notice dated **28/10/2013**, Notice dated **22/11/2013**, Notification of sale dated **20/4/2017**, certificate under **Section 15(c)** of the **Auctioneers Rules 1997** dated **25/4/2017**, Daily Nation Advertisement dated **29/5/2017**, a Public Auction Notice and a Report and Valuation of the suit land by Ms Fidelity Valuers dated **25/4/2017**, Daily Nation Advertisement dated **29/5/2017**, **10/5/2016**.

9. In a further affidavit of the plaintiff filed on **3/7/2017** and dated **3/7/2017**, the plaintiff disputes contents of the 1st defendant's replying affidavit. He states that the deponent never annexed a copy of a Statutory Notice dated **22/11/2010**; that he still disputes the alleged service upon him of the statutory notice; that no statement of account has been availed to him; that there is no evidence that credit has been given for the amount of **Ksh.150,000/=** paid back by him; that evidence of the deponent on service of the 45 days redemption notice and notification of sale is hearsay and inadmissible, that once advised the correct balance, the plaintiff would repay if furnished with a statement of account and that the intended sale of a 19.4acre farm for a debt of **Ksh.407,410** amounts to gross violation of the provisions of **Section 33** of the **Agricultural Finance Act**.

10. The Applicant filed submission on **13/7/2017** and the respondent filed its submissions on **18/7/2017**. Injunctions are equitable remedies that are granted at the discretion of the court. The principles for granting such injunctions were laid down in the celebrated case of **Giella Vs Cassman Brown And**

Company Ltd (1973) Ea 358 where the court held at page 360 as follows:-

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”

11. In the instant case therefore the questions that the court must ask itself are whether the plaintiff has:-

(1)Established that he has a *prima facie* case;

(2) Established that he stands to suffer irreparable damage.

12. If the plaintiff has not established the above, in determining the application, the court must ask itself on which side does the balance of convenience lie.

(1)Whether the plaintiff has established a *prima facie* case with probabilities of success

13. It is not denied that the plaintiff owes monies to the 1st defendant and that the suit land is charged to the 1st defendant to secure those sums owed. It is not also denied that he loan was not repaid within the time period stated in the agreement signed by the plaintiff which was one year.

14. However, in his plaint, the plaintiff pleads that the loan proceeds were meant for the growing of maize on his 19.4acre parcel of land, and unfortunately the crop failed for reasons beyond the plaintiff's control and he was therefore unable to repay the loan. I do not find any communication from the plaintiff to the 1st defendant conveying this information in the court record.

15. However I find copies of receipts for payment of **Ksh.100,000/= (No.0022509)** dated **28/1/2011** and for **Ksh.20,000/= (No.191600)** dated **22/8/2012**. It does appear that the plaintiff attempted to liquidate the loan sum. However I also do not find any communication from the plaintiff, after the alleged service of the demand notices dated **21/6/2010** and **28/10/2013**, asking for a statement of account from the defendant.

16. As is seen from the **prayer No. (c)** of the plaint, the plaintiff is seeking an account correctly showing the outstanding sum. The plaintiff does not properly distinguish between a statement of account and the communication of the sum due. What he seeks in the main suit is a statement of account; what he has been furnished with vide the notices and demands is the summary of the total sum due.

17. According to the plaintiff when he saw the notice of public auction affixed to some trees in the land, he went to the Kitale offices of the 1st defendant and obtained photocopies of the relevant documents. He does not state whether a statement of account was one of them. It can be presumed from prayers **No. (c)** in the plaint that the statement of account was not among them. Besides that the plaint has been served upon the defendant who has not insisted that a statement of account has been furnished to the plaintiff.

18. There are several vital observations that this court has made regarding the instant application. First is the lack of any evidence of demand for an account. Second is the fact that the indebtedness is not denied but is justified by the plaintiff on the basis of crop failure due to circumstances beyond control. Thirdly there is no evidence that the plaintiff tried to coax or cajole, as is normally the case in such instances, the 1st defendant into allowing him more time to settle the debt after the event of crop failure. Fourthly, the documents used in the procurement of the loan show that the plaintiff was intent on buying a growing maize crop while his plaint suggest that he borrowed the loan to help him grow maize on his 19.4 acres of land. Fifthly, the plaintiff has not demonstrated that other than the offers of Ksh.30,000/= and Ksh.70,000/= which he proposed to the defendant after visiting their office, that he has attempted to liquidate the debt at least up to the amount which he acknowledges as owing to the defendant as he awaits

the statement of account. The one main ground on which the plaintiff's application may be redeemed is that issue of whether or not the plaintiff was served with the appropriate statutory notice which is seriously disputed. This is an issue reserved for the main trial. For the purpose of the instant application, it suffices that a sufficiently amount of doubt as to such service has been raised at this interlocutory stage to raise the probability of a prima facie case.

19. However there are also reasons for this court's belief that the plaintiff may suffer irreparable loss and damage if the 1st defendant is allowed to dispose of the security before the hearing of his suit. One reason is that even the defendant does not dispute that the security is worth more than indebtedness of the plaintiff. Secondly, the plaintiff has his residence on the said land.

20. The suit is still at its infancy. The issues raised to persuade this court on the possibility of there being a *prima facie* case cannot be fully decided at this stage. They have to await the final determination of suit.

21. This court therefore resorts to consideration of the balance of convenience. In order to preserve the suit land and therefore the plaintiff's residence the court finds that the balance of convenience lies in granting the interim orders sought in the motion pending the hearing and determination of the suit.

22. I therefore grant **prayer No.3** in the application dated **20/6/2017**. To be more precise, the order of temporary injunction issued on **21/6/2017** in this case and which was later on extended is hereby confirmed pending the hearing and determination of this suit. The costs of the application shall be borne by the applicant.

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

Ms. Wanyama holding brief for Kiarie for Applicant

N/A for the Respondent

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017