



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 7 'B' OF 2017

ZACHARIA NDINGURI MWANGIPLAINTIFF

VERSUS

WANANCHI SACCO SOCIETY LIMITEDDEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 17th January 2017. The plaintiff seeks an injunction to restrain the defendant either by itself, its agents, servants or anybody acting under it from dealing with the properties known as Title No. SUBUKIA/SUBUKIA BLOCK 13/1468 and SUBUKIA/SUBUKIA WEST BLOCK 1/18 pending hearing and determination of the suit. The application is brought under sections 1A, 1B and 3A of the Civil Procedure Act and is supported by the affidavit of the plaintiff.

2. The plaintiff deposes that he obtained a loan of KShs 1,800,000 from the defendant and used the property known as Title No. SUBUKIA/SUBUKIA BLOCK 13/1468 as security in respect thereof. Subsequently, another loan was advanced by the defendant to the plaintiff's wife and the property known as Title No. SUBUKIA/SUBUKIA WEST BLOCK 1/18 was used as security in respect of this latter loan. Both properties were thus charged in favor of the defendant. He further deposes that although he has been servicing the loans as per the defendant's terms, the defendant has gone ahead to instruct an auctioneer to sell the properties without serving him any statutory notice on him. Though he is not specific on what he means by "statutory notice", states that the auctioneer served both him and his wife with a 45 days redemption notice. He has annexed a copy of the 45 days redemption notice and a copy of a notification of sale. Both were personally served upon the plaintiff on 4th November 2016. The auction sale was stated to be scheduled for 9th January 2017. The plaintiff thus urges the court to grant the injunction sought.

3. The defendant has opposed the application through the replying affidavit of Martin Mwangi sworn on 6th April 2017. He confirms that the plaintiff indeed obtained a loan of KShs 1,800,000 from the defendant. The property known as Title No. SUBUKIA/SUBUKIA BLOCK 13/1468, whose registered owner is James Mwangi Ndinguri, was charged as security in respect of the loan. He further deposes that the plaintiff had "become difficult when it comes to clearing his loan" as a result of which a statutory notice was issued upon the plaintiff on 12th August 2016. That despite promises, the plaintiff failed to settle the outstanding loan and as a result, the defendant instructed Jomuki Auctioneers who issued both a 45 days redemption notice and a notification of sale. All this was in respect of Title No. SUBUKIA/SUBUKIA BLOCK 13/1468.

4. As regards Title No. SUBUKIA/SUBUKIA WEST BLOCK 1/18 Mr. Mwangi deposes that the borrower was one Miriam Wacera Macharia who is neither a party to this suit nor has she objected to its

proposed sale. He annexed a copy of the first three pages of the legal charge as well as a copy of the Land Certificate for Title No. SUBUKIA/SUBUKIA WEST BLOCK 1/18 which show that the registered owner and chargor is James Mwangi Ndinguri. The defendant thus urges the court to dismiss the application.

5. Parties agreed to argue the application by way of written submissions. The applicant having failed to file submissions as agreed, the defendant proceeded to file its submissions. There was similarly no appearance for the applicant on the date scheduled for oral highlighting.

6. I have considered the application, the replying affidavit, the submissions on record and the authorities cited. In an application such as the present one, for the application to be allowed the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answer of the above two tests then the court can determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

7. Though the applicant has deposed that he is the owner of the properties known as Title No. SUBUKIA/SUBUKIA BLOCK 13/1468 and SUBUKIA/SUBUKIA WEST BLOCK 1/18, he neither exhibited any documentary proof of such ownership nor copies of the charge documents. On the other hand, the defendant states that the two properties are owned by James Mwangi Ndinguri who is also the chargor. The defendant has corroborated this position by exhibiting copies of the title documents as well as the first few pages of the charge documents. I am satisfied that though the plaintiff is the borrower, he is neither the registered proprietor nor the chargor in respect both properties. In the absence of any complaint by the chargor as regards the manner in which the proposed sale is being arranged, the plaintiff cannot stand in the chargor's place and seek to stop the exercise of statutory power of sale.

8. I also note from the replying affidavit that the plaintiff was in default as regards repayment obligations thus prompting the defendant to write to him a letter dated 12th August 2016. The plaintiff responded vide his letter dated 3rd October 2016 in which he admits being in arrears and makes proposals on how he intended to regularize the account. It is deposed on behalf of the defendant that the plaintiff did not honour his promises as regards the payments. The plaintiff did not challenge the defendant's evidence on these issues. I have serious doubt as to whether there would have been a case for an injunction even if the chargor was a party to this case. As Kwach JA stated in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American

If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.

10. In the end, Notice of Motion dated 17th January 2017 is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 29th day of September 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr. Koimet for the defendant/respondent

Court Assistant: Gichaba