



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 423 OF 2015**

**DR. ANDREW NJOROGE MBURU.....PLAINTIFF**

**VERSUS**

**NIC BANK LTD.....1<sup>ST</sup> DEFENDANT**

**JOSEPH M. GIKONYO T/A GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Dr. Andrew Njoroge Mburu (hereinafter referred to as the plaintiff)** has come to court against the **NIC Bank Ltd** and **Joseph Gikonyo t/a Garam Investments** for an injunction to issue against the defendants jointly and severally restraining them whether by themselves, their agents, servants from selling, transferring and alienating the land parcel known as Nyandarua/Gilgil West/682 pending the hearing and determination of the suit.

The plaintiff states that in the year 2013, he applied for a term loan of Kshs.4,000,000 secured by a charge to a title to his land. The charge was entered on 11.3.2013. He also applied for a hire purchase of motor vehicle No. KBL 787 K and a sum of Kshs.990,000 was advanced to that effect and the said facility secured by a chattels mortgage over the said vehicle. He applied for additional financing by way of overdraft of Kshs.2,000,000 in the year 2014 and credit card facility of Kshs.150,000. The 1<sup>st</sup> defendant secured the vehicle KBL 787 K in the facility albeit it was secured already as a chattels mortgage. The credit facility was also secured as a charge on land.

The plaintiff's further complaint is that the 1<sup>st</sup> defendant proceeded to charge to property for a further sum of Kshs.2,750,000.00 while no such sum has credited his account. The plaintiff states that on 16.11.2015, he found a notification of sale document left by the 2<sup>nd</sup> defendant at his home in Nyandarua showing that the sale is scheduled for the 9.12.2015, which intended sale the plaintiff contends is unlawful due to double charge and that the 1<sup>st</sup> defendant did not issue a statutory notice under section 90 of the Land Act, 2012. No valid notification of sale has been duly issued as required by the Auctioneers Act and that no redemption notice has been issued.

The plaintiff contends that no notice was served upon the spouse and that no proper valuation was done and that no reserve price has been set. On the issue of the accounts, the plaintiff contends that a single account combines the motor vehicle chattels transition and charge debts and that the accounts show that the charge and the chattel mortgage are duly served. He claims to have never received any notice.

The 1<sup>st</sup> defendant replied to the application through Kelvin Mbaabu, the Legal Officer of the 1<sup>st</sup> defendant who states that the plaintiff was advanced by the 1<sup>st</sup> defendant a term loan facility of

Kshs.4,000,000. The 1<sup>st</sup> defendant provided further facilities as follows:

(a) Overdraft	-	2,000,000.00
(b) Term loan	-	3,624,063.00
(c) Hire Purchase	-	815,805.00
(d) Credit Card	-	<u>150,000.00</u>
<b>Total</b>	-	<b><u>6,589,868.00</u></b>

A legal charge of Kshs.6.75 million was registered in respect of the property Nyandarua/Gilgil west/682 registered in the name of the plaintiff. A corporate guarantee of 4 million was given by Murindat Kenya Limited and chattel mortgage and a joint registration of motor vehicle. The plaintiff accepted the letter of offer that formed the basis of the credit facility. The amount captioned in the letter of offer dated 22.1.2014 of Kshs.3,624,063.00 was the balance of the term loan facility granted under the letter of offer dated 1.2.2013 when the facility was served.

According to the 1<sup>st</sup> defendant, the plaintiff has defaulted and the outstanding sum is Kshs.7,802,185.94 and therefore, the 1<sup>st</sup> defendant has a right to exercise his statutory power of sale. The plaintiff and wife were duly issued with the statutory notice, redemption notice and all other notices. The charge is valid and enforceable. The notification of sale and letter of notice were sent by registered post and posted on a prominent part of the property. The 1<sup>st</sup> defendant further states that a valuation was carried out in respect of the charged property. Each facility had a separate account. I have considered the application supported by the affidavit of the applicant, the replying and further affidavits on whose basis I will make my decision.

This court has time and again determined such matters in reliance on the *locus classicus* case of **Giella Vs Cassman Brown**. Injunctive orders are granted on the discretion of the court. The plaintiff has to satisfy the court that he has a prima facie case with the probability of success and that if injunction is not granted, he is likely to suffer irreparable harm. If the court is in doubt, then it decides on the balance of convenience.

The letter of offer dated 1.2.2013 was accepted on 4.2.2013. On the 22.1.2014, another letter of offer was addressed to the plaintiff. The total amount of the facilities offered was **Kshs.6,589,868.00**. The acceptance was made by the plaintiff on 30.1.2014. In the first letter, the plaintiff's address is 7770 – 00100. The first issue this court should determine is whether the plaintiff is in arrears. The plaintiff argues that the monthly instalment was not provided for and therefore, the issue of arrears does not arise. The defendant argues that the plaintiff is in arrears of **Kshs.7802185.94**.

I have looked at the two letters of offer of 1.2.2013 and 22.1.2014 and do find that the term loan was to be repaid within 60 months from the 1.2.2013 to the 19.3.2018. I have not seen a demand letter as envisaged by section 96(1) of the Land Act that provides for a demand notice. Moreover, since the term loan was payable within 60 days and the 60 days have not expired, I do find that the plaintiff is not in arrears on the term loan. The overdraft facility was repayable on demand. I have not seen the demand. Moreover, the utilized amount on the credit card facility was to be recovered every month from the borrower's current account. I do find that the 1<sup>st</sup> defendant has not satisfied the court that the plaintiff is in arrears and that the 1<sup>st</sup> defendant has written a demand notice that the plaintiff pays.

On the double charging of the property, I do find that the plaintiff bound himself by accepting the offer of 2.1.2014 and executing the charge documents and therefore, he cannot run away from his commitments. On valuation, the 1<sup>st</sup> defendant has demonstrated that the property was valued by Land Mark Realtors Limited and report prepared on 28.9.2015.

I have seen the statutory notice dated 23.2.2015, the 40 days' notice to sell under section 96(2) of the Land Act, 2012 but I have seen the certificate of postage dated 24.2.2015 of the statutory notice of sale. I have seen the certificate of service under section 15(c) of the Auctioneers Rules, 1997 by Joseph Mungai Gikonyo indicating that he served the notification of sale and the letter of notice. The addressee used is the address on the letter of offer supplied and confirmed by the plaintiff as Box Number 7770 – 00100, Nairobi. There is no notification of change of address the Post Office Box 63199 – 060, Muthaiga. I do conclude that the statutory of notice, Notification of sale, redemption notice were properly served. On the issue of notice being served upon the spouse, I do find that indeed, the defendant has not demonstrated that he served the spouse with the notice, however, the proper person to complain is the spouse to the plaintiff and not the plaintiff.

Having considered all the above, I do find that the plaintiff has a case that can go on trial on the issue of arrears and failure by the 1<sup>st</sup> defendant to demand as per the agreement. The term loan has a period of repayment of 60 days only on 19.3.2018. There is no provision for monthly instalments.

I have looked at the statutory notice and do find that it does not provide clearly for the period of default. On whether the plaintiff will suffer irreparably, I do find that the security being land, if the 1<sup>st</sup> defendant is allowed to sell, the subtratum may be lost if sold to another person by way of public auction, it may be put beyond the reach of the plaintiff.

Ultimately, I do grant the application thus, an order restraining them whether by themselves, their agents, servants from selling, transferring and alienating the land parcel known as Nyandarua/Gilgil West/682 pending the hearing and determination of the suit. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**A. OMBWAYO**

**JUDGE**