



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

HCC. NO. 4 OF 2016

GEORGE GITHAE KAMUNYA

MATHEW MURENDE SHIRABULA.....APPLICANTS

VERSUS

NAPOLEON WAKUKHA MURENDE

NATIONAL BANK OF KENYA LTD.....RESPONDENTS

RULING

1. The application before me is a Notice of Motion dated 30/8/2016 and filed on 20/4/2016. It was brought under order 40 Rules 1 and 2 of Civil Procedure Rules 2010. The application has four (4) prayers but at this stage, the court is only considering prayers (3) and (4), prayers (1) and (2) having been for consideration at an earlier stage. The disputants are four (4) with **GEORGE GITHAE KAMUNYA** and **MATHEW MURENDE SHIRABULA** being Applicants in the application and Plaintiffs in the suit while **NAPOLEON WAKUKHA MURENDE** and **NATIONAL BANK OF KENYA** are Respondents in the application and Defendants in the suit.

2. The prayers for consideration are as follows:

Prayer 3: That the court be pleased to grant an injunction barring the 2nd Defendant, its agents, employees or legal representative from putting up for public sale the following properties

i. DONYO SABUK BLOCK 1/40864, 1/40865, 1/40866, 1/408671, 1/40868, 1/40869, 1/40870, 1/40871, 1/40872, 1/40873, 1/40876, 1/40877, 1/40878, 1/40879, 1/40880, 1/40882, 1/40883, 1/40884, and 1/23156.

ii. Land parcel No. KAKAMEGA/SHIAKUNGA/170, KAKAMEGA/SHIAKUNGA/170, KAKAMEGA/SHIAKUNGA/1191 and ISUKHA/SHIAKUNGU/2122

Prayer 4: Costs of the application be provided.

3. The application is premised on grounds, *inter alia*, that the charge document signed by the parties was defective; that the charge document did not adhere to section 90 of Land Registration Act; that the notices given to the Applicants are inadequate and fail to adhere to provisions of Land Act; and that the right to sell the properties has not crystallized.

4. In the supporting affidavit accompanying the application, the Applicants depone to having guaranteed the 1st Respondent to obtain a loan of 15 million shillings from 2nd Respondent. The understanding then was that the 1st Respondent would pay the money as required. But the 1st Respondent defaulted in payment and the 2nd Respondent initiated the process of realizing its money through sale of the properties offered as security. It is in this context that the Applicants received a 45-day notification of sale from KEYSIAN AUCTIONEERS informing, *interalia*, of the intended sale of their properties on 6/5/2016. It is that intended sale that the Applicants are contesting.

5. In addition to the grounds given for opposing the sale, the Defendants are accused of operating in secrecy. The 1st Defendant is said to be still willing to repay the money if given time and the 2nd Respondent is faulted for not giving a chance to the Applicants to make arrangements to repay the money if the 1st Respondent has defaulted.

6. The 1st Respondent responded vide a replying affidavit dated 22/4/2016 and filed on the same date. He conceded to have defaulted in payment and explained that a combination of various adverse factors led to this. To begin with, a lorry transporting the goods he was supplying disappeared or was stolen with the goods. Then many of the people or organisations he had supplied goods refused or failed to pay him.

7. The 2nd Respondent filed its replying affidavit on 4/7/2016. It explained that the 1st Respondent has defaulted in payment. It was deponed that all the requisite notices were sent to the Applicants using the addresses given by them. It was therefore within the law to initiate the process of sale.

8. Further, the 2nd Respondent denied operating in secrecy and averred that the 1st Respondent and the Applicants have colluded together to frustrate the intended sale.

9. The application was canvassed by way of written submissions. The Applicants submissions were filed on 21/11/2016. According to the Applicants the requisite notice were not served. In short, Section 90 of the Land Act 2012 – not the Land Registration Act as stated in the grounds on the face of the application – was not complied with. Section 90 of the Land Act, 2012, enjoins, *interalia*, the issuing of notice before taking action on the defaulting party.

10. The issue of defective charge documents was also revisited and an allegation was also made that the charge document was obtained by misrepresentation. It was submitted too that the Applicants have not had any communication from the Respondents since the loan was guaranteed.

11. The 1st Respondents submissions were filed on 16/1/2017. He reiterated that the reasons for non-repayment of the loan by him were beyond his control. He asks that he be given time to make the payments. He stated too that he was not served with notice and the Applicants too were not issued with any.

12. The 2nd Respondents filed its submissions on 7/3/2017. It reiterated that the 1st Respondent has defaulted in payment. It was also submitted that the Applicants have not satisfied the conditions for interlocutory injunctive relief as spelt out in the case of **GIELLA vs CASSMAN BROWN & CO. LTD [1973] EA 358**.

13. I have considered the application, the responses made to it, and the rival submissions. I have had a look at the suit as filed and the defence of 1st Defendant.

14. I realise that the suit is not premised on non-service of any requisite notices. It is premised rather on defects in the charge document and fraud and/or surrounding the signing of that charge. And though everything in the suit seem to revolve around the charge document, that document itself is not availed.

15. The application was contemporaneously filed with the suit. At the time of filing, the issue of notices was known, or could be deemed to have been known, by the Applicants. It is a crucial issue to consider

when trying to establish whether a *prima facie* case is made. But it cannot be considered because when making such consideration, it is the suit as filed, rather than the application, that matters. Now the issue of notices is only raised in the application and comes across as an afterthought. And as it is not raised in the suit itself, I am not bound to consider it when trying to establish whether a *prima facie* case is made out or not.

16. The charge forms the basis of the suit. The Applicants failed to avail it. When they allege it is defective, I do not know what they mean. But I realise that a document marked “MS2” containing only two pages was annexed to the application. I have talked of two pages. It appears incomplete. The two pages are not the beginning. They are not the end either. The page numbers are not shown. If the Applicants wanted it to guide the Court, it should have been availed in its complete forms. As things stand, what is availed seem to conceal more than it reveals.

17. There is also another document, which is the letter of offer. It is not annexed and is not marked. I have looked at it. It is definitely part of the agreement between the parties. It is elaborate and detailed. I do not know whether it is the document they said to be unsigned but one thing is clear, it has some signatories. If the Applicants are faulting that document or any other because of lack of signatures, it has to be appreciated that they freely agree that they guaranteed the 1st Respondent. If they failed to sign some parts of any document, can they use their own omission to their own advantage? I think not.

18. It is freely acknowledged by the 1st Defendant that he is in default. By becoming guarantors the Applicants undertook to discharge the liability of the 1st Respondent in case of default. And this is so because a guarantee plays the role of a collateral engagement by a person to be liable for the debt of another in case of default.

19. The guiding principles in granting or refusing to grant interlocutory relief are to be found in *Giela's Case* (supra). The principles entail establishing a *prima facie* case with a probability of success; establishing whether the applicant might suffer irreparable loss not compensable in damages; and, where doubts arise, deciding the matter on balance of convenience.

20. When all is considered this matter, the Applicants are not convincing at this stage when they allege defects, fraud, and/or misrepresentation. And part of the reason they are not convincing is that they filed a bare plaint without the necessary witness statements and/or documents. It cannot be said therefore that they have established a *prima facie* case. The Court has to bear in mind that default is acknowledged. The fact of guaranteeing is also not in doubt.

21. On the issue of damages, it is necessary to observe that the 2nd Respondent is a bank. As a corporate body, it is a going concern and I do not think payment of damages would be a problem. More importantly however is the fact that the Applicants should have undertaken to pay damages to the 2nd Respondent should they ultimately lose the case. In **GATI vs BARCLAYS BANK (K) LTD: [2001] KLR 525**, the court held, *inter alia*, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue. The Applicants never gave an undertaking to pay damages in this case and this legal consideration therefore does not favour them.

22. The upshot? The Applicants have not persuaded the court that they merit temporary injunctive relieve on the basis of what they are alleging.

23. But there are other simple considerations which incline the Court to grant injunctive relief conditionally. And the considerations are these: At paragraph 15 of the supporting affidavit accompanying the application the 2nd Respondent, deponing on his behalf and on behalf of 1st Applicant states as follows:

Para 15: “that the 2nd Defendant ought to have given us a chance to repay the loan if the 1st Defendant has failed in honouring its obligations That they did not communicate to us till now shows we are forced to watch helplessly as they auction our property.”

At paragraph 19 of the same affidavit, the 2nd Applicant depones on his own behalf:

Para 19: “That given time to redeem my 3 properties I can be able to put up one for sale such that I can redeem the rest.”

The 1st Defendant states as follows at paragraph 21 of his replying affidavit:

Para 21: “That I will (sic) like to have the loan repaid and I am trying my best to raise funds and will (sic) not like to have the properties of the Plaintiff sold.”

24. What all these shows is that both the Applicants and the 1st Defendants are willing to pay if given time. In the interest of fairness, the Court is willing to give some time to the Applicants and the 1st Respondent to pay. That time must of necessity be limited given that the application is found to have no merit. I bear in mind too that the amount owed is not small and there is likelihood that if too much time is granted what is owed may even outstrip the value of the properties intended to be sold.

25. I therefore grant the Applicants temporary injunctive relief in terms of prayer 3 save that the relief will run for 3 months or 90 days from the date of delivery of this ruling. This temporary relief can be extended on expiry if serious commitments and efforts are made towards repayment of the owed amount to the satisfaction of the 2nd Respondent and/or the Court. And by “repayment”, I mean actual payment, not promises or payments that are only intended.

Dated, signed and delivered at Busia this 27th day of September, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant:

2nd Applicant:

1st Respondent:

2nd Respondent:

Momanyi & Co. Advocates for Applicants: ...

Imbenzi & Co. Advocates for Respondents: ...