



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS

ELC.358 OF 2017

JOSEPH KIMARI GUANGA.....PLAINITFF/APPLICANT

-VERSUS-

CO-OPERATIVE BANK OF KENYA LTD

(MUMIAS BRANCH).....1ST DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

By a *Plaint* dated **20th March 2017**, the Plaintiff/Applicant herein **Joseph Kimari Guanga**, has sought for various reliefs. The orders sought are:-

- a. A permanent injunction restraining the Defendants, their servants, agents or employees from selling, disposing of or in any way dealing with the land.***
- b. That the 1st Defendant remove the Bank Charge dated 19th day of 2007 and return of the Title Deed to the Applicant..***
- c. Costs of this suit.***

Contemporaneously, the Plaintiff/Applicant filed a *Notice of Motion* application even dated and sought for these orders:-

- a. A permanent injunction restraining the Defendants, their servants, agents or employees from selling, disposing of or in any way dealing with the LR.No.Limuru/Bibirioni/1475, in the name of Joseph Kimari Guanga.***
- b. That the 1st Defendant remove the Bank Charge dated 19th of February 2007, and return of the Title Deed to the Applicant.***
- c. Cost of this suit.***

The application is based on the grounds stated on the face of the application and on the *Supporting Affidavit* of **Joseph Kimari Guanga**. These grounds are:-

- 1. That a proclamation dated 19th February 2007 by the 1st Defendant/Respondent be declared null and void. Exhibit M1, M2 and M3.**
- 2. That instrument of a chattels mortgage, if any created and registered over the Plaintiff/applicant is defective in law and unenforceable.**
- 3. That instrument of a chattels mortgage, if any was registered without the knowledge and consent of the Plaintiff/Applicant.**
- 4. It is only fair and in the interest of justice that the orders sought be granted.**
- 5. That the Defendant/Respondent will not be prejudiced if the orders sought are granted.**

In his supporting affidavit, the Plaintiff/Applicant **Joseph Kimari Guanga**, averred that on or about **3rd August 2008**, the 1st Defendant/Respondent agreed to make a loan advance to its client **Joseph Ngugi Kamau**, loans of various accounts without his consent or instrument of a chattel. He averred that he was advised by his advocate that the said action was highly irregular more so when the second security was completed without his knowledge. He contended that he never executed any other instrument of chattel mortgage. Further that he is now completely paralyzed and suffering immensely due to the unlawful possession of his title deed. He urged the Court to allow his application. The Application is opposed by the 1st Defendant, **Co-operative Bank of Kenya**, who filed grounds of opposition and stated as follows:

- 1. The orders sought by the Plaintiff in the Notice of Motion dated 20th March 2017, cannot be granted in an interlocutory application, since the same are final orders which can only be granted upon hearing of both parties during the final determination of the matter.**
- 2. The Plaintiff's Notice of Motion is fatally defective and the orders therein as drafted are incapable of being granted.**
- 3. The Plaintiff has not denied that the borrower owes the 1st Defendant the outstanding sum and thus has no prima-facie case with any probability of success.**
- 4. The 1st Defendant has granted the borrower sufficient time to regularize his account but the efforts have yielded no results.**
- 5. The Plaintiff's Complaint discloses no cause of action against the 1st Defendant and thus the grant of interim orders will only serve to delay the 1st Defendant from realizing its security.**
- 6. The 1st Defendant has fully complied with the law in the process leading up to the intended auctioning of Title No.Limuru/ Bibirioni/1475.**
- 7. The Applicant's application is an attempt to deny the 1st Defendant its right to realize its security after the borrower whom he guaranteed, defaulted on the loan granted to him.**
- 8. The application is an abuse of the due process of law and is geared intentionally to subvert and delay the cause of justice.**

Further **Gerald Maina**, the Business Banker employed by 1st Defendant swore a **Replying Affidavit** on **19th June 2017**, in opposition of the instant **Notice of Motion**. He averred that the application and affidavit are full of falsehoods and are both meant to unjustly deny the 1st Defendant its legitimately acquired security.

It was his averment that on **9th October 2006**, **Joseph Ngugi Kamau T/A Joskey Agencies**, made an application for a **loan facility of Kshs.4,500,000/=**. Further that the said loan facility was payable within

36 monthly instalments of kshs.125,000/= on or before 30th day of every month. Further the said loan facility's security was personal guarantee by **Joseph Kimari Guanga**, supported by legal **charge** over title **No.Limuru/Bibirioni/1475** to be registered in favour of 1st Defendant. Therefore the Plaintiff executed the charge document as the chargor, wherein he offered the suit property as security for a loan issued to **Joseph Ngugi Kamau** as per annexure **GM2**. The said charge was duly registered on **19th February 2007**, at Kiambu Lands Registry and the funds were disbursed to the borrower.

He further averred that the borrower defaulted in the loan repayment and he was issued with **Demand Notice** by the 1st Defendant on **22nd October 2007** as per annexure **GM3**. When the borrower failed to regularize his account, the 1st Defendant was compelled to issue him with another Demand Notice on **18th August 2008**. The deponent contended that when the borrower completely defaulted, pursuant to Section 74 of the Registered Land Act, the Bank issued the Plaintiff with Statutory Notice of its intention to exercise its Statutory Power of Sale of **Limuru/Bibirioni/1475**, as per annexure **GM6**. Therefore the 1st Defendant instructed **Garam Auctioneers** to issue relevant notifications and serve the same to the debtor and guarantor personally. The said notification of sale and letter of Notice were served on the guarantor's son, **Stephen Muigai** and also on the guarantor, the Plaintiff herein by the registered mail.

He further averred that the suit property was advertised for sale by public auction but the Plaintiff approached the District Commissioner, Kiambu West District, who requested the Bank to halt the auction to enable the Plaintiff settle the debt as evident from annexure **GM10**. He contended that even when the Plaintiff was advised to pay **25%** of the outstanding loan, he has failed to pay the said loan from **June 2009**. Further, that the borrower has also not paid the said amount and therefore the Plaintiff/Applicant has provided no basis for the grant of any restraining orders. It was his contention that the loan was issued with the full knowledge of the Plaintiff and he even executed the charge in favour of the Bank in perfection of a security issued for the loan facility to the borrower, **Joseph Ngugi Kamau**. He further contended that the charge was registered on **19th February 2007**, and it is valid and enforceable against the chargor who is the Plaintiff herein as long as the loan is outstanding. He urged the Court to dismiss the suit.

The application was canvassed by way of written submissions which this court has carefully read and considered. The Court has also considered the pleadings in general and the relevant provisions of law.

The Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. The said discretion must be exercised judicially. Further at this stage, the Court will not be dealing with the disputed facts conclusively or definitively based on the affidavits evidence. The Court is only to determine whether the Applicant is entitled to the injunctive orders based on the usual criteria. See the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at this stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The principles that will guide the court in deciding whether to grant the orders sought are the ones enunciated in the case of **Giella...Vs...Cassman Brown Co. Ltd (1973) EA 358**, which states as follows:-

- a. The Applicant must establish that he has a prima facie case with probability of success.***
- b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. When the Court is in doubt, to decide the case on a balance of convenience.***

Therefore, this Court will first determine whether the Applicant has a *prima-facie* case with probability of success at the trial. In the case of **Mrao Ltd.. Vs.. First American Bank Ltd & 2 others (2003) eKLR**

125, *prima-facie* case was described as follows:-

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for a explanation or rebuttal from the latter”

In the instant case, there is no doubt that one **Joseph Ngugi Kamau T/A Joskey Agencies** took a loan facility of **Kshs.4,500,000/=** from the 1st Defendant and the said loan was secured by personal guarantee of the Plaintiff herein and who signed a legal charge to secure the said loan facility using his property **Limuru/Bibirioni/1475**. However, by **22nd October 2007**, the said borrower had defaulted and the 1st Defendant issued the borrower a Demand Notice.

It is also evident that the said borrower never paid the demanded amount and the 1st Defendant chose to exercise its Statutory Power of Sale as provided by Section 74 of the Registered Land Act (Now repealed). Before the scheduled date of the public auction, the then District Commissioner, Kiambu West District intervened for the Plaintiff on an assurance that the guarantor who is the Plaintiff herein would pay the outstanding amount. The letter from the District Commissioner, Kiambu West is dated **2nd June**

2009. There is no evidence that the Plaintiff herein nor the said **Joseph Ngugi Kamau**, the borrower ever paid the outstanding amount. Though the Plaintiff alleged in his supporting affidavit that the borrower had paid the loan facility, there was no affidavit from the said borrower to confirm that allegation.

The Court will rely on the case of **Ebony Development Co. Ltd...Vs...Standard Chartered Bank Ltd (2008) eKLR**, where the Court held that:-

“The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal borrower. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation, but to pay on demand the guaranteed sum.”

Equally, in this matter the loan facility was guaranteed by the Plaintiff herein. There was a demand upon him to pay and it was his contractual obligation to pay which he has not done so. The 1st Defendant is therefore within its right vide the legal charge to exercise its Statutory Power of Sale under Section 74 of the Registered Land Act (now repealed). The Plaintiff has not given a valid reason as to why this Court should restrain the 1st Defendant from exercising its Statutory Power. There is no evidence that the 1st Defendant has ever threatened to sell the suit property from the **year 2009**. The Court finds that the Plaintiff has not established a *prima-facie* case with probability of success at the trial.

On the second limb of whether the Applicant will suffer irreparable loss which cannot be compensated by an award by damages, the Court finds that the Plaintiff herein voluntarily offered his parcel of land as security over the loan facility borrowed by **Joseph Ngugi Kamau**. He voluntarily signed the legal charge and charged the suit property. Once the plaintiff offered his suit property as security, it became a commodity for sale and he cannot turn around and allege that he will suffer irreparable loss which cannot be compensated by an award of damages. See the case of **Isaack O. Litali...Vs...Ambrose W, Subai & 2 others, HCCC No.2092 of 2000**, where the Court held that:-

“ I am of the opinion that once land has been given as security for loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful

.....for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security.....”

On the balance of convenience, it is clear that the borrower took the loan facility in the **year 2007**. He was to pay the same over a period of 36 months or 3 years. The borrower defaulted and the security was

to be realized in the **year 2009**, but the same was halted on the request of the Plaintiff. There is no evidence that the Plaintiff has paid the outstanding amount though he has a contractual obligation to pay upon demand. The balance of convenience tilt in favour of the 1st Defendant who is indebted by the Plaintiff herein.

On the second prayer of removing the Bank Charge dated **19th February 2007**, and ordering for the return of the **Title Deed** to the Plaintiff, the Court finds that is mandatory order which is granted in very exceptional circumstance. There are no special or exceptional circumstances herein to warrant the grant of such order. See the case of **Kenya Breweries Ltd & Ano..Vs..Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109**, where the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See **Volume 24 Halsbury Laws of England 4th Edition Paragraph 948**

The order ought herein by the Plaintiff/Applicant would only be granted after evidence has been called at the full hearing, tested in cross-examination and if found merited, then the Court would grant it. For now the court finds the said order not merited.

Having now carefully considered the instant **Notice of Motion** dated **20th March 2017**, the court finds it not merited. Consequently, the same is entirely dismissed with cost being in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this **23rd** day of **October 2017**.

L. GACHERU

JUDGE

In the presence of;

Plaintiff/Applicant – present in person

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the Plaintiff/Applicant and absence of the Defendants/Respondents though date taken in open court.

L. GACHERU

JUDGE

23/10/2017