



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO 34 OF 2017

HASSAN KIPTOO KEMBOI.....PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT/RESPONDENT

IGARE AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of the Plaintiff/Applicant's Notice of Motion dated 5th April 2017. The Notice of Motion is brought under Order 40 rules 1, 2 (1) and 9, Order 51 of the Civil Procedure Rules section 3A and 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya and Section 103 of the Land Act.

The main prayer sought by the applicant is for an injunction to restrain the defendants/respondents, by themselves, their agents, servants and/or anyone acting on their behalf from selling, transferring and doing any other act which is prejudicial to the plaintiff's interest in land parcel number KERICHO/LONDIANI/JOUBERT/ BLOCK 3 (CHEBEWOR/539)

The application is supported by the affidavit of John Hassan Kiptoo Kemboi the applicant herein. In the affidavit he depones that he obtained a loan facility of Kshs. 3 million from the 1st defendant in July 2011. The said loan was secured by a charge over land parcel number KERICHO/LONDIANI/JOUBERT/ BLOCK 3 (CHEBEWOR/539).

The applicant depones that he has been repaying the loan until recently when he was unable to do so as he had some cash flow challenges after being defrauded of some money.

He maintains that even though the 1st defendant has threatened to sell the suit property through the 2nd defendant, this is not necessary as he is still ready and willing to service the loan. He states that if the suit property is sold, he will lose his livelihood and him and his family will be rendered homeless.

The application is opposed by the 1st defendant/respondent through the affidavit of Paul Chongo, the 1st defendant's credit manager, Kericho Branch sworn on 26th April 2017. In his affidavit he depones that the applicant started defaulting as soon as his account was credited causing his loan account to attract huge interest. He further depones that since the applicant failed to honour his contractual obligation, the 1st respondent complied with the statutory requirements with a view to exercising its statutory power of sale. After issuing the necessary notices, the 1st respondent instructed the 2nd respondent to advertise the applicant's property for sale by public auction.

The 1st respondent maintains that if it is inhibited from exercising its statutory power of sale, the bank will suffer as the outstanding amount is likely to outstrip the value of the property.

The main issue for determination is whether the plaintiff/applicant has satisfied the conditions for the grant of interlocutory injunction.

The case of **Giella Vs Cassman Brown 1973 EA 358** sets out the principles governing the grant of injunctions as follows:

- a. An applicant must show a prima facie case with a probability of success
- b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury
- c. When the court is in doubt, it will decide the application on the balance of convenience

In her submissions counsel for the Plaintiff/applicant states that since the suit property was proclaimed for sale, he has raised Kshs. 450, 000 in reduction of the outstanding loan. She further submits that the applicant is willing to repay the loan in full in order to save his home. She has cited the case of **Alice Awino Okello V Trust Bank Ltd and Another quoted in the case of Kismani Holdings Ltd & Another V Fidelity Bank HCCC No. 744 of 2012. (2013) eKLR** where the Court of Appeal stated as follows:

“The balance of convenience is in favour of the applicant as the sale of one’s property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed in doubtful circumstances”

With respect, the facts in the said case are distinguishable from the instant case as there are no doubtful circumstances here. The debt is admitted by the applicant and he has not denied that he was served with the requisite notices before the 1st defendant sought to exercise its statutory power of sale.

The 1st respondent has pointed out that the applicant has not satisfied the conditions laid down in the Giella case as he has admitted that he is indebted to the 1st respondent hence he has not established a prima facie case with a probability of success. The case of **John Edward Ouko V National Industrial Credit Bank Ltd (2013) eKLR** held that

“It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party”

Furthermore, the 1st respondent has expressed the fear that if he is restrained from selling the suit property until the suit is heard and determined, there is a real risk that the debt may outstrip the value of the suit property as the applicant’s account has fallen into arrears. In the case of **Andrew Muriuki Wanjohi V Equity Building Society Ltd and 2 Others (2006) eKLR** the court held that since there was a real risk that the debt may outstrip the value of the suit property if the defendant was restrained from selling the suit property pending the hearing and determination of the suit, the balance of convenience was found to be in favour of the defendants.

I have carefully considered Pleadings, Notice of Motion and affidavits of both parties as well as the rival submissions of counsel and I am of the view that the application lacks merit and is hereby dismissed with costs to the defendants.

Dated, Signed and delivered this 18th day of October 2017

J. M ONYANGO

JUDGE

In the presence of:

Miss Chelimo for the Plaintiff/Applicant

Mr. Koske for B. Langat for the Defendant/Respondent

Court Assistant: Rotich