REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 355 OF 2016

JOHN KIPKUGUT KURGAT.....1ST PLAINTIFF

SET LIMITED.....2ND PLAINTIFF

VERSUS

TRANS-NATIONAL BANK (K) LIMITED.....1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT

RULING

The application before court is dated 28.11.2016 wherein the plaintiffs seek orders that the defendants be restrained whether by themselves, their servants and/or agents from selling whether by private treaty or public auction, transferring or conveying or in whatever way interfering with the plaintiffs' proprietary interests in the land parcel known as NANDI/KILIBWONI/605, pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit. The application is based on grounds that the plaintiffs have a prima facie case with a probability of success and that damages shall not be an adequate remedy That if in doubt, the balance of convenience tilts in favour of maintaining the *status quo*.

In the supporting affidavit, John Kiprugut Kurgat states that he is the proprietor of the land parcel known as NANDI/KILIBWONI/605 measuring 17.79 acres and director of the 2nd Plaintiff. That the 2nd Plaintiff was pursuant to a contract contained in the letter of offer dated 25th March, 2011 granted an overdraft of Kshs.1,500,000 and a term loan of Kshs.8,500,000 totaling to Kshs.10,000,000 and as a collateral for the facilities to the 1st Defendant, the 1st Defendant charged the land parcel known as NAND1/KILIBWON1/605 for a sum of Kshs.2,650,000 and also charged the land parcel known as ELDORET MUNICIPALITY/BLOCK 21(KINGONGO) 3994 for Kshs.850,000 and further a charge of Kshs.8,000,000 over I.R. No. 76160 registered in the name of Kipsang Arap Ruto, several and joint guarantees by 1st Plaintiff and Sheillah C. Mwei of Kshs.10,000,000 and personal guarantee of Kshs.8,000,000 was also offered.

By dint of the said letter of offer and which formed the basis of the loan contract between the parties, the terms agreed on regarding the credit were that the overdraft facility was to accrue annual interest of 19.0% p.a. maximum whilst the term loan facility was to accrue annual interest of 17.0% p.a. maximum. The overdraft facility was scheduled for review after 12 months from the date of the letter of offer. The term loan facility was repayable in 48 months' time.

The plaintiff laments that credit facilities advanced by the 1st Defendant have been duly serviced however, the 1st defendant insists that the facility is outstanding in the sum of Kshs. 14,305,951.68 and the 1st Defendant is seeking to exercise the chargee's statutory power of sale and sell the same by way of public of auction due to commence on 30th November, 2016 in Kapsabet town. The complaint against the 1st Defendant is that she varied the rate of interest from 19.0 % p.a. to 22.1% p. a without any notice to the borrowers and him and his voluntary consent or that of the borrower sought contrary to the loan agreements, the law and the Standard Banking Practices compiled by the Kenya Bankers Association (KBA). That the 1st Defendant demanded a sum of kshs.14, 305,951.68 an amount which is illegal and unjustified when the total credit advanced pursuant to the agreement of 25.3.2011 was Kshs. 10,000,000/=.

The plaintiff states that the 1st Defendant demand is unlawful and based also on illegal interests and the penal charges if any have not been substantiated whatsoever. The 1st Defendant acted in breach of the agreements of the parties by failing to review the overdraft facilities in accordance with clause 3 of the letters of offer within 12 months hence no interest could be charged on the overdraft facility after the said date and that the term loan facility is not subject to any interests or tariffs charges.

The 1st Defendant despite receiving payments through sale of land reference No. ELDORET MUNICIPALITY /BLOCK 21 (KINGONGO) 3994 never accounted for the proceeds and that the 1st Defendant proceeded to unlawfully and illegally dispose of the land reference No. ELDORET MUNICIPALITY/BLOCK 21 (KINGONGO) 3994 within three years instead of 48 months as stipulated by the letter of offer. The 1st Defendant having accorded the borrower the opportunity to sale One of the charged securities privately and the same having been carried out and the amounts deposited with the 1st Defendant, it waived whatever rights it had under the charges and the contracts and is stopped from claiming any other amounts.

On the process of sale, the 1st plaintiff state3s that the 1st Defendant never issued him with proper prescribed statutory notices issued informing him and/or to specifying the amounts that must be paid to rectify any alleged default as required by section 90 (1) (2)(a) and (b) of the Land Act, 2012. He was never issued with a statutory notice of not less than 40 days as required by section 96(2) of the Land Act, Laws of Kenya. The 1st Defendant is seeking to sell his property by private treaty without having regard to the market value contrary to section 98(1) (d) of the Land Act, 2012.

The myriad of complaints is that 1st Defendant is seeking to sell his property by public auction without setting a reserve price and complying with the requirements of the Auctioneers Act, 1996 contrary to sections 98(1) (e) and (2) of the Land Act, 2012. In any event, the said intended sale by public auction is premature and incompetent. No valid redemption and notifications of sale have been issued to him as required by the Auctioneers Act, 1996, Rule 15 of the Auctioneers Rules, 1997 and Section 89 of Land Act, 2012. The 1st Defendant has flouted section 44 A of the Banking Act, Cap. 488, Laws of Kenya. No Land Control Board consent was obtained as required by the law (Cap 302), Laws of Kenya, the suit land being an agricultural land since there are no minutes to that effect. The suit property is a matrimonial property which at the time it was being charged spousal consent was never sought.

There is likelihood that the suit property is in grave danger of being sold and/or alienated by the Defendants to his peril and he is therefore seeking the court protection to prevent Defendants from acting unlawfully in the interest of justice. The plaintiff is currently hopeless, insecure, apprehensive and uncertain about the Defendants intentions and the real possibility of the suit herein being rendered nugatory unless restraining orders are issued by this honourable court. He stands to suffer irreparable loss and damage unless the Defendants are restrained by means of a temporary injunction from alienating, selling, trespassing upon, leasing, subdividing, interfering with his quiet and vacant possession of and/or dealing in any other manner whatsoever.

In the replying affidavit, Wilson Ruto, the Branch Manager, Eldoret states that the 2[11d] plaintiff borrowed

loan facilities of Kshs.10,000,000/= on 25th March ,2014 as shown in the offer letter and that the directors of the plaintiff offered land parcel number NAND1/KILIBWON1/605 in the name of the 1st plaintiff and ELDORET MUNICIPALITY/BLOCK 21(KINGONGO) 3994 in the name of 2nd plaintiff and L.R NO. 76160 in the name of one Kipsang Arap Ruto as security and charged both properties in favour of the bank for sum of Kshs.2,650,000/=, 850,000/= and 8,000,000/= respectively. The 1st plaintiff executed the Charge instrument on account of the said loan facilities to the 2nd plaintiff and charged his property to wit NANDI/KILIBWON1/605. That on 12.11.2015, the bank issued a demand letter wherein the plaintiff was required to repay the total amount of Kshs.13,764,410.68. That the plaintiffs failed to respond to the demand letter and the bank proceeded to issue three months statutory notices through its lawyers.

According to the 1st defendant, the plaintiffs failed to repay the loan and the defendants proceeded to instruct auctioneers who subsequently proceeded to issue the notices under the auctioneer's rules. The plaintiff presently owes the defendant in excess of Kshs. 14,305,951/= and the amount continues to accrued interest. The respondent denies having charged the interest outside what was provided for in the offer letter and the charged interest outside what the law permits and averments to the contrary are a non-starter. The term loan was to be repaid within 48 months but the applicant defaulted in the repayment of the installments failed to fully service the loan.

Statutory notices were duly issued to the applicant as per address in the charge instrument provided by the plaintiff chargor. The respondent has right to sell part of or all of the charged securities to recover unpaid debts owed by the borrower. Consent to charge was sought and obtained by the 1st applicant. Matrimonial consent was not a requirement in 2011 when the charge was created.

The first defendant concludes that the plaintiffs were properly served with all the requisite statutory notices, consequently the suit and application are without basis and indeed untenable. The defendant is perfectly entitled to exercise its statutory powers of sale as all statutory requirements have been duly complied with. That the plaintiffs' application is an abuse of the process of court as same is intended to delay recovery of huge debt of over 14 million which amount includes accrued interest.

The plaintiff submits that they have shown some prima facie with high chances of success because interalia, the 1st Defendant varied the rate of interest from 19.0 % p.a. to 22.1% p. a without any notice to the applicants and Applicants voluntary consent or that of the borrower sought contrary to the loan agreements, the law and the Standard Banking Practices compiled by the Kenya Bankers Association (KBA). The same is not disputed by the 1st Respondent and they urge the Honourable Court to be guided by paragraph 10(a) of the 1st Respondent's Replying affidavit herein and that the 1st defendant did not comply with the legal requirements on service of the statutory notice, Notification of sale and redemption notice.

On the issue that applicant will suffer irreparable injury if the injunction is not granted, the Plaintiffs/Applicants submits that damages cannot be an adequate remedy in this case. What the Applicants seeks transcends monetary value. The Plaintiffs/Applicants have been in occupation of the suit property since it was acquired, developed the suit land substantially and other development plans for the suit property are underway. If the injunction is not granted, the developments undertaken and which are underway by the Plaintiffs and which are of a permanent nature will be interfered with and the suit herein will be of no consequence to the Plaintiffs/Applicants since the very act that the Applicant seeks to prevent by seeking this injunction will have happened and thus suit will be rendered nugatory in view of the prima facie case that the Plaintiffs have herein. Further, the Plaintiffs/Applicants substantial investments worthy multimillions will go to waste.

The plaintiff relies on the case of **Francis Githinii Karobia v Stephen Kageni Gitau Civil Case 53 of 2005 (unreported),** where **Kimaru** J stated;

> ***"This court notes that land being unique in nature and character, damages in certain instances would not constitute an adequate remedy."*** It is their submission that damages would not in any way be an adequate remedy to compensate the Plaintiffs/Applicants in this case.

On Balance of convenience, the plaintiff submits that it is in favor of the Plaintiffs as the Plaintiffs are the ones in possession of the suit land for many years and given that there is a dispute regarding the suit property herein, it is desirable that this dispute be resolved before that suit property can be interfered with. An order of declining an injunction as prayed by the Plaintiffs will allow the Defendants to continue with the advertisement of the suit land herein and subsequently alienate it to the detriment of the Plaintiffs. This is likely to prejudice the Plaintiffs. In this case, the Plaintiffs are the one who has shown that his rights are likely to be contravened if the order of interlocutory injunction is not granted. The Plaintiff further urges to be guided by the Decision of the Court in the recent case; ***Church of Christ of Latter-Day Saints-Kenya Registered Trustees v John Ndirangu & 2 Others Nairobi ELC Case No. 16 of 2011 (Unreported).*** In this matter, if the injunction is not granted, the Plaintiffs/Applicants rights to enjoyment of property will be contravened. They therefore respectfully submit that the balance of convenience tilts in favour of the Plaintiffs/Applicants.

The plaintiffs/applicants have therefore demonstrated sufficient grounds for the grant of an injunction and have met the test for the grant of an injunction as was settled by the case of ***Giella V Cassman Brown & Co. Ltd (1973) EA 358***.

DEFENDANT'S SUBMISSIONS:

The defendants submit that the plaintiff does not deserve the orders sought for and has failed to satisfy the twin requirements enabling the court to issue restraining orders and further requirement in the event of doubt that the balance of convenience tilts in their favour. The defendant further submits that the said orders being equitable orders the plaintiffs conduct prior to filing suit, as at time of obtaining orders of injunction now prevailing and further at all material times of this suit have been less than candid. That the orders sought for being in the nature of temporary injunction are equitable orders intended to prevent and defeat a wrong, an injustice and/or irreparable damage to the applicant. However, the plaintiffs' actions defeat the very essence and principle of equity which demands that he who comes to the courts of equity must do so with clean hands.

The plaintiff failed to settle the principle amount and agreed installments and therefore is not entitled to the orders sought. Similarly, that it is not disputed that the said facility taken out was an overdraft facility which would attract interest over time. The defendant reiterates that parties executed instruments where they had agreed and further forewarned the borrower of interest and further given a description of the chargeable rate interest and therefore the arguments disputing the interest rates and accumulated amounts cannot hold any water. It is our submission that the said allegations are a non-starter. Further, that such allegations lack basis as they have not been substantiated. The bank has since clarified this position directing the court to the executed agreement and charge instrument of parties. The court cannot re-write this document but can simply do its best to implement it.

The plaintiff disputes being in arrears and further that amounts demanded in the Notification of Sale are irregular and exaggerated. However, he has not annexed and/or presented such evidence pointing to his compliance during the loan period and/or payment of the amount in arrears. Further documents indicating that he had cleared the loan within the loan period and thus statutory Notice ought not to have issued in the first place have not been availed to this court.

The defendants submit that the plaintiffs case is untenable and that once the 1st plaintiff charged his land, the same became a commodity of sale in the event there was default. That the terms of the charged instrument as executed, allowed the chargee to exercise its statutory power of sale.

The defendant submits that, the charge instrument was executed sometime in the year 2010 before the provisos of the Land Registration Act of 2012 were enacted and that the parties made the said disposition in land with the provisions of the Registered Land Act Cap. 300 of the Laws of Kenya as it then was. The Act did not provide and /or contemplate a need spousal consent. Section 30 of the Registered Land Act Cap. 300 does not confirm spousal rights to be part of overriding interests in disposition in land therefore the provisions of the Land Registration Act No. 3 of 2012 are inapplicable to the said charge transaction.

The defendant cites the case of case of ***Albert Mario Cordeiro, Farida Rehmat Khan -Vs - Vishram Shamji eKlr (2015)***, the court being faced with a similar scenario of facts noted that the plaintiffs had become belligerent defaulters and were ready to fight on not to repay the loan advanced. The court noted that such time had passed during the pendency of the application and the debtors had not paid a single cent. The defendant had not recovered its money. The court noted that the plaintiff had not presented a prima facie case to this extend.

In ***Rose Chepkurui Mibei —Vs- Bank of Africa & 2 others Kericho ELC No. 24/2015 eKLR (2015)***, the court observed that where a good statutory notice was issued, there was no basis for a bank to be stopped from exercising its statutory power of sale. Further, that once default notice is served upon the guarantor, his obligation must take effect immediately unless it is agreed that the guarantor will not be called upon to make good money owing by the principle debtor. The court noted that statutory notice ought to be issued to the chargor's last known address as per the charge instrument.

The defendant submits that the plaintiff cannot be said to be at risk of suffering irreparable damage or loss when he willfully offered his property to be part of the charge and further failed to avoid sale by regularizing the loan account or make effort to comply with statutory notice and notification of sale Indeed upon executing the charge instrument he was aware of the consequences of default. That whatever nature of property he had offered the same became a commodity of sale under terms of the charge instrument.

The defendant submits that the balance of convenience tilts in the favour of the bank which legally began the process of exercising its statutory power of sale. The plaintiff breached the terms of the loan facility and further terms of charge instrument, they did not regularize the position thus causing statutory notice to be issued, upon lapse of the period of notice the bank issued notification of sale further scheduling sale by public auction and indicating the value it had been sold. The plaintiff's actions can only be said to be candid when they pay up what is due since interest continue to accrue or further exercise the equity of redemption before the hammer falls and property is transferred to the highest bidder.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

1) whether the applicant has demonstrated a prima facie case with a probability of success.

2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.

3) Where the balance of convenience tilts if the court is in doubt.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. ***Prima Facie*** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a ***Prima Facie*** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed.

There is no doubt that the 2nd plaintiff borrowed loan facilities amounting to Kshs.10,000,000 and that the directors of the plaintiff offered land parcel number NAND1/KILIBWON1/605 in the name of the 1st plaintiff and ELDORET MUNICIPALITY/BLOCK 21(KINGONGO) 3994 in the name of 2nd plaintiff and L.R NO. 76160 in the name of one Kipsang Arap Ruto as security and charged both properties in favour of the bank for sum of Kshs.2,650,000/=, 850,000/= and 8,000,000/= respectively. The 1st plaintiff executed the Charge instrument on account of the said loan facilities to the 2nd plaintiff and charged his property to wit NANDI/KILIBWON1/605. The 2nd plaintiff has failed to pay the loan and therefore the defendant issued what he refers to as the notice of the intention to exercise the statutory power of sale.

I have looked at the document referred to as the formal demand for payment dated 12th November 2015 and do find that the same does not fit the description of the notice of the intention to exercise the statutory power of sale. I have also looked at the purported notice to exercise of the statutory power of sale marked as ***annexture WR4*** and do find that same is not a statutory notice envisaged by section 90 of The Land Act no 6 of 2012, as the same was a notice to sell as envisaged under section 96 of the said Act. Moreover, the notice indicates that the chargor was given a notice of 40 days as opposed to 90 days and therefore it cannot be construed to be a statutory notice if sale as the later lapses after 90 days.

This court is not satisfied that the 1st defendant served the plaintiffs with a proper statutory notice as envisaged under the provisions of section 90 of the Land act. Moreover, if the notice dated the 13th of June 2015 is a purported statutory notice then there is no 40 days' notice to sell envisaged under the provisions of section 96 of the Act. Having heard the process server known as Maina Mwangi testify on oath I'm satisfied that he was saying the truth because of the photographs that were annexed in his affidavit on which he relied heavily and the fact that he appeared consistent in his testimony and therefore it is my finding that the notification of sale was served. However, having found that there is no evidence that the statutory notice, which is the cornerstone of such actions, was served then it is my conclusion that the plaintiffs have established a prima facie case with a probability of success.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that ***irreparable injury*** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing. On this issue, the court finds that the plaintiffs having offered their properties as security the properties became commodities for sale and the same can be valued and the damages payable can be ascertained.

The court should issue an injunction where the ***balance of convenience*** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of ***balance of convenience*** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the ***balance of inconvenience*** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

In this matter, I agree with the plaintiff that that the ***balance of iconvenience*** a is in favor of the Plaintiffs as the Plaintiffs are the ones in possession of the suit land for many years and given that there is a dispute regarding the suit property herein, it is desirable that this dispute be resolved before that suit property can be interfered with. An order of declining an injunction as prayed by the Plaintiffs will allow the Defendants to continue with the advertisement of the suit land herein and subsequently alienate it to the detriment of the Plaintiffs. However, the court finds that since the 2nd plaintiff is owing the 1st defendant it is prudent that the process of recovery of the debt to be carried out afresh by following the law as envisaged in sections 90 and 96 of the land act 2012. Costs of the application to the plaintiffs.

Dated and delivered at Eldoret this 20th day of November, 2017.

A. OMBWAYO

JUDGE