REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 390 OF 2016

MICAH TERER……..……....1ST
PLAINTIFF/APPLICANT

WILSON KIPKETER RONO……..…..2ND
PLAINTIFF/APPLICANT

VERSUS

LETSHEGO KENYA
LIMITED……...…….……DEFENDANT/RESPONDENT

RULING

Micah Terer and **Wilson Kipterer Rono** have sued **Letshego Kenya Limited** for a temporary and permanent injunction restraining the defendant its servants, agents from advertising and offering for sale **Moiben/Moiben Block 2 (Segero)/184**, either by public auction or private treaty. The grounds for the said prayers as discerned from the supporting affidavits are that the defendant varied the interest rates contrary to the confidential letter of offer. Moreover, the defendant clogged the plaintiff equity of redemption. The plaintiffs further claim that they were not issued with the statutory notice in compliance with section 90(1), 90(2)(b) of the Land Act. That the 40 days statutory Notice under Section 96(2) of the Land Act, 2012 was not issued. The plaintiffs state that the suit parcel is of unique character and therefore the plaintiffs cannot be adequately compensated if the land is sold.

The defendant filed a replying affidavit whose gist is that the defendant offered the 1st plaintiff a facility of Kshs.3,000,000 guaranteed by the second defendant. The plaintiffs offered the suit land as security. The spousal consent was duly executed by Julia Jepkorir Rono in compliance with the law. The first plaintiff took a further facility of Kshs.1,500,000 secured by the same parcel of the suit land. The defendant alleges that the 1st plaintiff has failed to service the loan even upon demand. The guarantor has been given notices to realize the security. The loan is still outstanding and the plaintiff is in arrears and therefore, the sale is justified and does not clog the equity of redemption. The defendants state that the debt is likely to outstrip the value of the suit property and therefore, the balance of convenience tilts towards not granting the injunction.

That plaintiffs filed supplementary affidavits that did not respond adequately to the allegations by the defendant in the replying affidavit save that the redemption notice was defective and that the suit property is matrimonial property where the 2nd defendant's home sits and that his wife and children are in occupation of the same.

The applicant submits that the respondent's statutory power of sale has not accrued as per the provision of section 90(1) and 90(2) (b) of the Land Act, 2012. There is no evidence of posting of the Notices and

therefore, the plaintiffs' assertion that they were not notified as required by law stands. The applicant also disputes interest and penalties. On the above note, the applicants argue that they have established a prima facie case with a likelihood of success. Moreover, they argue that unless injunction is granted, the plaintiffs will suffer irreparable harm. On balance of convenience, the plaintiffs argue that it tilts towards maintaining *status quo*.

The defendants argue that the plaintiffs have not established a prima facie case with a likelihood of success. According to the defendant, the plaintiffs have not established a prima facie case with a probability of success as it is not denied that the 1st plaintiff borrowed the sum of Kshs.4,500,000. The plaintiffs have failed dismally in their private duty to service the loan by payment of monthly instalments and the loan account is in arrears of Kshs.1,516,101.40 and that the outstanding principle is Kshs.4,718,825.45. The plaintiffs have done nothing for eight months to rectify the situation. The defendant submits that he complied with the provision in law for serving the statutory notice to exercise the statutory power of sale and has served the redemption notice.

The defendant further submits that the applicants have not demonstrated that they will suffer irreparable injury which would not be compensated with award of damages. Moreover, the defendant argues that extending the time for compliance or rectifying the default will be prejudicial to the defendant since such extension will lead to accruing of more interest which the plaintiffs might not be able to pay making it hard for the defendant to recover the full amount due. On balance of convenience, the defendant argues that the balance of convenience tilts towards the respondent.

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.

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 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 ***Mrao Vs First American Bank of Kenya and 2 Others 2003 eKLR***, the Court of Appeal held that: -

The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case. I would certainly think that it would be in the appellant's interest to adopt a genuine and arguable case standard, rather than one of a prima facie case, the former being, in my opinion, the lesser standard of the two."

So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

In this matter, there is no dispute that the 1st plaintiff approached the defendant for a facility of Kshs.4,500,000. There is no dispute that the facility was guaranteed by the 2nd plaintiff and there is no dispute that the 1st plaintiff is in arrears; however, the main bone of contention is whether the defendant issued the statutory notice of exercise of power of sale. I have looked at the replying affidavit and do find that there is no evidence of service of the statutory notice. Moreover, there is no evidence of service of redemption notice. The plaintiffs allege that they were not served and therefore the defendant had a duty to furnish the court with evidence of service. Failure to produce the evidence of postage of the notices or service of the same means that the plaintiffs have proved that they have a right that has been infringed, that is the right to be notified of the intention to exercise the statutory power of sale and the right to redeem the property. I do find that the plaintiffs have established that they have a prima facie case with a likelihood of success.

Whether the plaintiffs are likely to suffer irreparable harm, I do find that it has not been demonstrated that the plaintiffs will suffer irreparable harm that cannot be adequately compensated in damages as the property has been valued and the report filed. The defendant being a financial institution, has the capacity to compensate the plaintiffs if the award of damages is made.

On balance of convenience, I do find that it tilts in favour of the plaintiffs as the defendant has not followed the right procedure and cannot be allowed to realize the security unprocedurally. Moreover, the 2nd plaintiff will be more inconvenienced if injunction is not granted. I therefore, do order that the defendant is restrained from alienating, advertising, selling, taking possession, leasing, transferring, charging or otherwise in any manner whatsoever, interfering with land parcel number Moiben/Moiben Block 2 (Segero)/184 since the plaintiff is still owing the defendant a substantial amount of money. I do order that the defendant commences the process of recovery of the suit property within the confines of the Land Act, 2012. Every party to bear own costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF NOVEMBER, 2017.

A.OMBWAYO

JUDGE