



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND OF KENYA COURT AT ELDORET

E&L CASE NO: 9 OF 2015

WILLIAM KIMUTAI KANDIE.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD & ANOTHER.....DEFENDANT

RULING

William Kimutai Kandie through his Attorney John Kamar has sued the consolidated Bank of Kenya Company Ltd and Protus Wanga T/A Timeless Dolphin Auctioneers. The plaintiff claims to be the sole absolute proprietor of the lease hold interest comprised in the land parcel known as **Eldoret Municipality/Block 14/255** which measures 0.4047 Hectares and avers that the 1st defendant advanced a loan to Lomsons Enterprises Limited and that the plaintiff entered into a guarantee agreement limited to the tune of Kshs.13,000,000/= and charged his property namely the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/255 and the charge debt indicated therein is Kshs.13,000,000/=. The 1st defendant instructed the 2nd defendant to sell the plaintiff's land in purported exercise of statutory power of sale which act the plaintiff believes is unlawful and a nullity for the reasons:-

- a) The 1st defendant has not issued any valid statutory notice as required by law.***
- b) The notification of sale issued by the 2nd defendant seeks to recover a sum of Kshs.66,673,424.60 which amount is not the subject of the charge and/or guarantee agreement.***
- c) The amount sought to be recovered flouts the induplum principle under section 44A of the Banking Act, Cap. 488 being 6 times the principal amount.***
- d) No redemption notice and notification of sale were duly served as required by law upon the plaintiff/Chargor.***
- e) The 1st defendant has accorded undue indulgence to the principal debtor making the guarantee contract to be discharged by beach.***
- f) The 1st defendant has tolerated the breach by the principal – debtor of the loan contract.***
- g) The redemption notice and notification of sale mention the chargee as Consolidated Bank Ltd and Consolidated Bank of Kenya.***
- h) The chargee has not specified the exact breach of the loan contract and/or charge terms that have been flouted.***

l) the chargee has not specified the nature and extent of the default by the plaintiff/chargor as required by section 90(2) (a) of the land Act, 2012

j) The chargee has not specified the exact amount that requires to be paid to remedy the breach as required by section 90(2) (b) of the Land Act, 2012

k) No valuation prior to sale has been carried out as required by section 97(2) of the Land Act, 2012

l) Exhaustion of remedies has not been carried out by the 1st defendant taking steps to enforce the loan contract as against the principal-debtor prior to resorting to the charges statutory power of sale.

m) No notice has been issued to the chargor's spouse as required by section 97(3) (c) of the Land Act, 2012.

n) The notification of sale is a nullity as it indicates that the encumbrance of the suit land is in favour of Oriental Commercial Bank limited to secure a sum of Kshs.12,000,000/= and a charge dated 22nd March, 2011 that has never been executed by the plaintiff.

o) the newspaper advertisement is defective as it locates the property at Eldoret County which is non existent.

p) No notices have been served upon the principal – debtors required by law.

The plaintiff thus seeks a declaration that the defendants intended exercise of the statutory power of sale is a nullity coupled with a perpetual injunction restraining jointly and severally from selling, transferring or in any manner whatsoever dealing with the land parcel known as **ELDORET MUNICIPALITY/BLOCK 14/255** with Costs and interests.

The suit was accompanied with an application for interlocutory injunction contemporaneously with plaint seeking an order that an interlocutory injunction do issue against the defendants jointly and severally restraining them from selling, advertising, transferring or in whatsoever manner dealing with the land parcel known as **Eldoret Municipality/Block 14/255** pending the hearing and determination of the application in the first instance and thereafter pending the hearing and determination of the suit. The application is based on grounds that the plaintiff has a *prima facie* case with a probability of success and that damages shall not be an adequate remedy and that the balance of convenience tilts in favour of maintaining the *status quo*. The application is supported by the affidavit of John Kamar who states that the plaintiff is the sole registered proprietor of the lease hold interest comprised in the land parcel known as Eldoret Municipality/Block 14/255 which measures approximately 0.4047 hectares. In essence, the 1st defendant advanced a loan facility to Lomsons Enterprises Ltd and by way of guarantee a charge was entered on the suit land for a sum of Kshs.13,000,000/=. The plaintiff's property was advertised by the 2nd defendant for sale on 28th January, 2015.

The 2nd defendant had left in the deponent's possession a redemption notice and notification of sale. He claims that the plaintiff as the chargor was never personally served with the documents and service upon the deponent when he was not his attorney was invalid.

He claims that the postal address of the plaintiff is not **P. O. BOX 6784-30100, but P. O. BOX 817-30100, ELDORET** as it appears in certificate of lease and that it is indeed clear that the 1st defendant's statutory power of sale is yet to arise to enable it to instruct the 2nd defendant. The notices and the intended exercise of the statutory power of sale are a nullity for the reasons given in the body of the application. The defendants filed a statement of defence whose gist is that the plaintiff was served with all the Notices relevant under the Land Laws, but the plaintiff neglected and or refused to exercise his equity of redemption by paying the arrears or the outstanding amount and that the plaintiff is more particularly indebted to the Defendants jointly and severally together with other guarantors to the tune of

Kshs.64,960,523.16 which sum continues to attract interest at contracted rates. According to the defendant, the plaintiff willingly charged his property as an additional security together with other lands to secure a facility of Kshs.76,023,660/= and immediately thereafter appointed John Kamar to act as his agent and the suit is an attempt to run away from a lawful binding surety agreement and infringe on the plaintiff's right of Statutory Sale. He believes that the court should only consider a breach and remedy the same without issuing a perpetual injunction that would clog the 1st Defendant's right of statutory sale. The plaintiff has deliberately withheld the charge document and the guarantee document to hoodwink the court into believing that the 1st Defendant was only entitled to recover Kshs.13,000,000/=.

1. In a replying affidavit filed on 23/2/2013 the 1st defendant through Jackson Kiptala Taboi the branch Manager Consolidated Bank of Kenya Ltd Eldoret states that the 1st Defendant granted Lomsons Enterprises Ltd a loan facility of Kshs.76,023,660/- which was to be secured by a third party charge in favour of the bank together with guarantees from all the sureties. The principal borrower defaulted and the 1st Defendant duly commenced recovery Process by issuing a Statutory Notice to the plaintiff through his last known address of P. O. Box 817 – 30100 Eldoret. The 1st Defendant further instructed the 2nd Defendant to take over recovery process after the plaintiff refused to honor the covenant to pay as stipulated in the charge and guarantee. The 2nd defendant duly issued the 45 days redemption Notice and notification of sale and which were personally received on behalf of the plaintiff by his agent John Kamar as well as served through post. The 1st defendant further states that it is mischievous for the plaintiff through his agent to deny personal service yet all along he has been acting as the Plaintiff's Agent known to the Defendant thus he is stopped from implying lack of authority. The security pledged by the plaintiff was to secure the debt together with other lands for the entire sum of Kshs.76,023,660/= of which Kshs.65,953,176.16 is now outstanding and Kshs.11,334,706.46 in arrears. The statutory Notices specifically stated the arrears to be Kshs.6,792,474/- and the outstanding balance to be Kshs.72,228,217.6 as at 32 January 2014. The plaintiff's property was properly valued before the intended sale as required by law. The plaintiff's guilty of material non disclosure having intentionally concealed the primary documents that would explain the demand Kshs.72,228,217.60. The security issue was limited to Kshs.13,000,000/=, however a dispute as to the amount due does not entitle the Plaintiff any injunctive reliefs.
2. In a Supplementary Affidavit dated on 10/3/2015, the plaintiff states further that the statutory notice was never served upon the chargor who is he plaintiff herein as required by section 90 of the Land Act, 2012 as the plaintiff's address contained in the guarantee contract is P. O. Box 6748, Eldoret and that according to the list of ordinary parcels posted at page 51 of the replying affidavit an unidentified parcel was sent to address '717-30100, Eldoret which is not the chargors/guarantors address. The letter annexed as 'JKT3' at page 50 of the replying affidavit is not a valid statutory notice for the purposes of section 90 of the Land Act, 2012 for the reasons:-

a) The letter is not written on the 1st defendant's official letter head as it does not have physical and postal address of the 1st defendant.

b) The nature and extent of default and extent of default has not been stated.

c) The amount that must be paid to rectify the default has not been stated.

d) The time within which the payment of the default amount should be made has not been stated

e) the letter does not expressly state the exact remedy of the chargee that is sought to be exercised if the default is not rectified.

The plaintiff depones that the notice was also not served by the 1st defendant as the sender in list of registered postal packets is 'Consolidated Bank' and which is a different person from the 1st defendant as established by the Consolidated Bank of Kenya Act, Cap. 488 C of the Laws of Kenya.

The plaintiff believes that the relationship between the plaintiff and 1st defendant is based on the

guarantee contract at page 37 of the replying affidavit and which prescribes that the only remedy of the 1st defendant as against the plaintiff is to file a suit to enforce the guarantee hence no right to sale the plaintiff's property is the subject of guarantee agreement and reference can be made to clause 15.2 of the Guarantee and Indemnity contract.

The plaintiff further argues that the 1st defendant has no valid charge registered in its favour as no valid contract was entered into prior to creating the charge as required by section 3 of the Law of Contract Act, cap. 23 as the guarantee which would be the said contract does not contain the duly authorized signature of the signatory to the 1st defendant and duly attested to as required by the Land Registration Act, 2012 more so, it is undated meaning that the date when the contract was created is unknown and that the charge also is invalid as it has no date when the chargee duly executed the same and the attestation verified. The notification of sale contained at page 53 of the replying affidavit is a nullity as it is at page 54 states that the encumbrances contained on the register of the land is in favour of Oriental Commercial Bank Ltd to secure a sum of Kshs.12,000,000/= and is dated 22nd March, 2011.

The notification of sale and the redemption notices were never served by registered post as the certificate of service at page 55 to the replying affidavit does not contain information as to service of that nature. The certificate of service is a nullity as it fails to comply with rule 15 (c) of the Auctioneers Rules, 1997 as the date of the documents served are not indicated. The redemption and notification of sale notices contravene rule 15(d) of the Auctioneers Rules, 1997 as they contain an amount of Kshs.66,673,424.60 while the annexure JKT 3 contains a sum of Kshs.72,228,217.60. The plaintiff claims that the 1st defendant did not comply with section 97 (2) of the Land Act, 2012 as the valuation report indicates:-

a) The 1st defendant has no chargee's interest in the suit land as it indicates the encumbrance on the title is in favour of Oriental Commercial Bank Ltd for Kshs.12,000,000/= dated 22nd March, 2011 who is not the 1st defendant reference can be made to page 68 of the replying affidavit.

b) The report a page 64 of the replying affidavit indicates it is for mortgage purposes which does not exist under the Land Registration Act, 2012 any more as only charges are recognized.

c) The property was inspected on 30th May, 2012 while the purported statutory notice by the chargee is dated 31st January, 2014; reference can be made to page 69 of the replying affidavit.

d) The report relies on a Registry Index Map (RIM) of ELDORET MUNICIPALITY BLOCK 1 which is not the suit land which is ELDORET MUNICIPALITY/BLOCK 14/255 reference can be made to page 69 of the replying affidavit.

e) The instructions to prepare the valuation report arose from the Branch Manager of Eldoret who is not a duly authorized agent of the chargee/attorney with a duly registered power of attorney.

The plaintiff submits that there was no proper statutory notice served on the chargor. It was not sent to the chargors known address and that it was not on a letter head. The plaintiff further submits that the letter offended section 90 (2) and(3) of the Land Act 2012 and the consolidated Bank of Kenya Act Cap 488 C laws of Kenya. Moreover, the plaintiff argues that section 96(3) of the Land Act and was not complied with and therefore that the 1st respondent had no right to sale the property as the guarantee contract provided for sale and that there was no valid contract prior to creating the charge. Moreover, that the 1st defendant did not comply with section 77 (2) of the Land Act. The plaintiff further argues that the redemption notice and notification for sale were not served and that the 1st defendant did not comply with section 97(2) of the Land Act 2012.

The 1st Defendant submits that it was proved that there exists a debt owned by the principal debtor which has not been repaid. On service the 1st Defendant submits that the statutory notice was served by

registered post on the address supplied by the plaintiff thus 817-30100 Eldoret. The 1st defendant has argued that the charge is valid and therefore the plaintiff should not claim that he cannot reply the pledged amount because of the invalidity.

The principles for granting interlocutory injunctions was set out in the *locus classicus case of Giella vs Cassman Brown* thus for an order of injunction to be granted the plaintiff should prove that he has a *prima facie* case with a probability of success. Secondly, that if injunction is not granted he is likely to suffer irreparable loss not compensable in damages. Lastly, that if the court is in doubt then it can apply the principle of balance of convenience.

On the 1st principle, I do find that the 1st Defendant offered Lomsons Enterprises Ltd of P O Box 6784 – 30100 banking facilities in loan of Ksh.76,023,660/=.

The above was guaranteed by among others, a charge dated 8/8/2012 from William Kimutai Kandie (plaintiff) over Eldoret Municipality Block 14/255. In the charge, the plaintiff gave his postal address as 817-30100 Eldoret and on the 8/2/14, the statutory notice dated 31/1/2014 appears to have been sent to plaintiff as it was sent to the postal address in the Charge document. On the 3/6/2014, the 2nd defendant was instructed to commence the process of recovering the security.

I have seen the statutory notice, notification of sale, and 45 days redemption notice and statement of account. The allegation that the 1st defendant intends to recover amount of Kshs.66,673,424.60 that is not subject of the charge is arguable and has probability of success as the plaintiff was not the only chargor in respect of the debt owed by the principal debtor and that a cursory look at the charge document reveals the amount secured by the plaintiff as Kshs.13,000,000 plus interest at 19%. On the allegation that the amount sought to have recovered offends the *in-duplum* principle under section 44 A of the Banking Act Cap 488 being 6 times the principle amount this court finds that the allegation is arguable due to the fact that the amount secured is Ksh.13,000,000/= and if **Section 44A (2) of the Banking Act Cap 488 Laws of Kenya** was to be applied the maximum amount to be charged is the principal loan owing when the loan became non-performing, interest in accordance with the contract between the debtor and the institution not exceeding the principle owing when the loan became non-performing and the expenses incurred in the process of recovery of any amount owed by the debtor.

Subsection 2 should be read with Subsection 5(b) of the Act which provides that “loan” includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person. It is important to note that the plaintiff's loan as provided herein was a financial guarantee of Ksh.13,000,000/= and therefore the figures in the statutory notice of sale, notification of sale and redemption notice of Kshs.66,673,424.60 are questionable.

On the issue of service of the statutory notice, I do find that the charge registered on 13/8/2012 the plaintiff gave his address as 817 – 30100, Eldoret whilst in the Guarantee and indemnity the address is given as 6748 – 30100, Eldoret. These addresses are used interchangeably and it will be splitting hairs to find that either of the postal addresses is not proper. The plaintiff executed both the charge and the guarantee and cannot now complain that either of the addresses is not his.

Moreover, the argument by the plaintiff that the relationship between the plaintiff and defendant is based only on the Guarantee contract is not acceptable as the charge executed by the plaintiff and 1st Defendant creates a chargor, chargee relationship between the plaintiff and defendant in which relationship the 1st Defendant has a right to realize the security there in default.

This court finds that on the basis of the in-duplum principle and the fact that the notification of sale and redemption notice were sent to the plaintiff's agent on the 8th February 2014 and not the plaintiff when the record shows that Mr John Kamar, the said agent became the plaintiff's attorney on the 13th January 2015, the plaintiff has satisfied this court that he has a *prima facie* case with a likelihood of success. The 1st, Whether the plaintiff stands to suffer irreparable loss that is not capable of compensation with damages I do find that the loss claim can be quantified and that the plaintiff has not demonstrated that the 1st Defendant will not be able to compensate him if injunction is not granted. However, the court is

inclined to grant an injunction to maintain status quo as the applicant is in possession of the property which is developed with a maisonette, servants quarters and a poultry house and therefore the balance of convenience tilts towards granting an injunction.

Ultimately, the application is allowed in that an interlocutory injunction do issue against the defendants jointly and severally restraining them from selling, advertising, transferring or in whatsoever manner dealing with the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/255 pending the hearing and determination of the pending the hearing and determination of the suit. Costs in the cause. Orders Accordingly.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF JANUARY, 2016.

ANTONY OMBWAYO

JUDGE