



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO: 431 OF 2013

JACOB KIPSUM ARAP NGENY.....PLAINTIFF

VERSUS

JOHN KIPRUGUT KURGAT T/A JOPHIK ENTRPRISES.....DEFENDANT

RULING

On the 14/5/2015 by way of counter claim JOHN KIPRUGUT KURGAT the 2nd defendant in the original suit and now the Plaintiff in the counter claim filed amended defence and counter claim averring that the 1st defendant in the counter claim instructed the 2nd defendant in the counter-claim to sale the land parcel known as TULWET/TULWET BLOCK 7 (TERIGE)/57 of which he is the principal debtor in respect of which a loan contract, which land acts as collateral and pursuant to the instructions thereto the 2nd defendant has caused to be issued a notification of sale of immovable property dated 20th March, 2015 indicating that the land was to be sold on the 26th May, 2015. The plaintiff avers that the intended sale of the property is unlawful and a nullity for the reasons:-

- a. *No valid statutory notice was issued by the 1st defendant as required by the Land Act, 2012 to the principal debtor.*
- b. *No statutory notice has been issued and served upon the spouse of the chargor as required by the Land Act 2012.*
- c. *No valid chargees's interests exists in favour of the 1st defendant to enable it exercise any statutory power of sale.*
- d. *The notification of sale is anullity s it is issued pursuant to the repealed Registered Land Act, Cap. 300.*
- e. *the notification of sale is in violation of the Auctioneers Rules, 1997 as it does not contain the amount to be paid or recovered.*
- f. *No valuation of the property has been carried out as required by section 96 of the Land Act, 2012.*
- g. *the plaintiff is not indebted to the 1st defendant as any charge debt in favour of Fina Bank Ltd was cleared.*
- h. *The plaintiff has overpaid the loan amounts.*
- i. *The chargee has acted in flagrant violation of section 44A of the Banking Act, Cap, 488 by charging and levying illegal charges on the account.*

The plaintiff thus prays for a declaration that the intended sale is a nullity, and that the court should issue a perpetual injunction restraining the defendants from selling, transferring or in whatsoever way alienating the land parcel known as TULWET/TULWET BLOCK 7 (TERIGE)/57 coupled with the taking of accounts in respect of the loan contract between the plaintiff and the 1st defendant together with a refund of any sums as shall be certified upon the taking of accounts. The plaintiff herein has also filed an application for an order of interlocutory injunction against the defendants in counter-claim namely

Guaranty Trust Bank (Kenya) Ltd and Leakey's Auctioneers restraining them whether by themselves, their servants and-or agents from selling, transferring, alienating or evicting any persons from the land parcel known as TULWET/TULWET BLOCK 7 (TERIGE)/57 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the counter-claim and that accounts be taken as between the 2nd defendant (now plaintiff in the counter-claim) and the 1st defendant in respect of the payments made and the legality of the charges levied by the 1st defendant in respect of the current account No: 1711800213 and loan account No. 1774100022 by an independent Certified Public Accountant of Financial expert as the Honourable Court may deem fit to appoint. The taking of accounts be carried out within 21 days and a report certifying the amounts be lodged in court for adoption. The directions be given as to the costs of the expert appointed. The applicant prays for costs of this application be provided for. The application is based on grounds that:-

1. ***THAT the 2nd defendant/now plaintiff in the counter-claim has a prim-facie case with probability of success.***
2. ***THAT damages shall not be an adequate remedy.***
3. ***THAT the balance of convenience tilts in favour of maintaining the status quo.***
4. ***THAT in order for accounts to be taken, if I settled law that the court should rely on the opinion of an expert.***

The application is supported by the affidavit of the plaintiff wherein he states that he obtained a loan from the 1st defendant and which was guaranteed by way of collateral by the plaintiff who charged the land parcel known TULWET/TULWET BLOCK 7 (TERIGE)/57 measuring approximately 28.78 Hectares of 71.11 acres and has completed repaying the money advanced and in fact over paid by Kshs.975,682.65 but has learnt that despite the said state of affairs whereby the 1st defendant owes him Kshs.975,683.65 it is still in the process of exercising the chargees statutory power of sale and that the sale of the suit land was scheduled for the 26th may, 2015. The 2nd defendant had issued a notification of sale dated March, 2015 which was invalid on grounds *inter-alia* that no valid statutory notice was issued by the 1st defendant as required by the Land Act, 2012 to the principal debtor and that no statutory notice has been issued and served upon the spouse of the chargor as required by the Land Act, 2012. The plaintiff further contends that no valid chargee's interests exists in favour of the 1st defendant to enable it exercise any statutory power of sale and therefore based on the foregoing, it is clear that a *prima-facie* case with a probability of success of the counter-claim exists and that damages shall not be an adequate remedy as a sale of the suit land when it is apparently clear that the 1st defendant owes him, shall be unlawful and shall deprive the plaintiff of this propriety contrary to article 40 of the Constitution of Kenya, 2010. Lastly, that the balance of convenience would tilt in maintaining the status quo if a doubt exists as the plaintiff is in occupation of the suit land.

In the replying affidavit of the 1st Defendant sworn by Beatrice Ndurya, she states that the application amounts to abuse of court process on the grounds that this Honourable court delivered a ruling on 30th September 2014 in which it refused the plaintiffs Application for injunction and summary judgment. Moreover, that the 2nd Defendant's Application for an injunction is *res judicata* for the reasons that the 2nd Defendant, who has always been party to these proceedings, ought to have raised the same issues now raised in the previous application filed by the plaintiff, and ultimately decided by the court. The 2nd Defendant in paragraph 2 of his Replying Affidavit to the Plaintiff's Application for injunction deponed that he was not opposed to prayer 2 of the plaintiff's Notice of Motion Application which prayer was to the effect that a temporary injunction do issue against the 1st Defendant. By not opposing the Plaintiff's prayer for injunction, the 2nd Defendant indirectly supported the Plaintiff's prayer for injunction and thus he should not be heard now to come to this court to seek an injunction. The 2nd Defendant does not have *locus standi* before this Honourable Court and therefore, has no capacity to bring the application as the suit property is still registered in the name of the plaintiff and since there has not been any transfer in the 2nd Defendant's name, he thus lacks locus to bring this Application for injunction.

The respondent contends that the 2nd Defendant's assertion that no valid statutory notice was issued by the 1st Defendant as required by the land Act, 2012 is misleading as the 1st Defendant did indeed issue and serve a valid statutory notice. This notice was considered by the court in its aforesaid ruling dated 30/09/2014, it was found to have been issued and since the honourable /court dismissed the injunction

application, the issue of validity of the statutory notice cannot arise again and that the 2nd Defendant herein is not married to the Plaintiff/Chargor herein and therefore, the 2nd Defendant should not be heard to argue that no valid statutory notice was issued/served upon the Chargor's spouse.

According to the respondent, there is no legal requirement to effect service of the statutory Notice upon the spouse of a chargor and therefore the 2nd Defendant's contentions in this regard do not hold any water and that as regards the Notice to sell under Section 96 (3) (c) of the Land Act, 2012 the property in issue herein, Title No. TULWET/TULWET Block 7 (TERIGE)/57 is exclusively used for agricultural use consisting of maize plantation and animal husbandry and therefore, the allegation by the 2nd Defendant that the property is a matrimonial home is not only misleading but out rightly false and unfortunate.

That in any valid and proper Notice to sell, the Certificate of postage and the Affidavit of Service by Mr. George Ochieng is proof thereof. The ruling dated 30th September 2014, this Honourable court did find as a matter of fact that there existed a valid charge in favour of the 1st Defendant, as such the 2nd Defendant is not being forthright when he alleges that there is no valid chargee's interest in favour of 1st Defendant.

The 2nd Defendant is not being truthful to this Honourable court when he states that the notification of sale was issued pursuant to the repealed Registered Land Act. On the contrary, the Notification of sale was issued under the provisions of the Land Act, 2012. It is not true that a valuation report has not been carried out as claimed by the 2nd Defendant. The respondent has attached a true copy of the upto date valuation report by N. Realite Limited dated 17th October, 2014).

The respondent states that the 2nd Defendant is still indebted to 1st Defendant contrary to the findings of Financial Advice Centre Forensic Audit report dated 17th April, 2014. The 2nd Defendant was indebted to the bank in the sum of Khs.3,973,294.62 as at may 31, 015 and which sum continued to accrue interest at the rate of 27.75% until payment in full. The 1st Defendant has not levied illegal charges on the loan account held by the 2nd Defendant and neither has it violated any of the provisions of the Banking Act and in particular section 44A.

In a supplementary affidavit, the plaintiff states that the application is not *res judicata* and that he has *locus standi* to agitate the suit being the principal debtor in this matter. He reiterates that statutory notice did not indicate the nature and extend of the default and was not duly served upon the chargor, Principal debtor and the County Commissioner of Uasin Gishu County. He further claims that the chargor is known as **Jacob Kipsum Arap Ngeny** with an address of P. O, Box 24, Lessos, the Principal debtor is known as **John Kiprugut Kurgat**, p. o. Box 2212, Eldoret and no public office known as the D.C Eldoret exists with an address Box 30 – hence the notices were served upon strangers to the transaction and non-existent persons and that no statutory notice in the name of the 1st defendant in the counter-claim has been issued and served upon him as the principal debtor. That no affidavit of service or certificate of service exists to demonstrate that he was served with the statutory notice as required. That the notification of sale dated 20th March, 2015 is a clear admission of his claim in the counter-claim that no indebtedness exists as it does not contain any amounts of money sought to be realized or recovered by the intended sale.

The plaintiff submits that no right of sale exists in favour of the 1st Defendant which can be carried out by the 2nd Defendant due to aforesaid reasons and that he has *locus standi* and that the principles of *Res-judicata* do not apply.

On *Res Judicata* the plaintiff argues that when the plaintiff in the original suit filed the application for injunction, no counter claim existed in the suit and that Government Trust Bank (K) Ltd and Leekey Auctioneers were not also parties to the suit (**Note that they were parties but different names**). He argues that the plaintiff never applied for injunction prior thereto and that no court has discussed the issue of notification of sale of 20/3/2013 and the newspaper advertisement dated 11/3/2013. He argues that the counter claim is a separate suit and that no decision has been made by the court or any other court over issues in the current application.

On locus standi, the plaintiff argues that he has locus standi as the principal debtor and that was engaged in correspondence by the 1st defendant.

The plaintiff argues that he has satisfied the principles set out in **Giella -vs- Casman Brown** as no valid chargee's interest exist in favour of the 1st Respondent to enable it exercise any statutory power of sale in respect of the property and that no valid statutory notices were issued by the 1st Respondent or the 1st Defendant in the original suit as required by the Land Act, 2012.

The plaintiff further argues that the statutory notices of sale is a nullity as it is issued pursuant to the respected Registered Land Act Cap 300 Laws Of Kenya and that the Notification of sale is in contravention of the Auctioneers Rules 1997 as it does not contain the amount to be paid or recovered. Moreover, that there was no compliance with service of notice under section 96(2) of the Land Act 2012. According to the plaintiff, the valuation report was deficient.

On balance of convenience, the plaintiff argues that it tilts towards maintaining the status quo and that there is an expert report showing that he does not owe the bank.

Lastly, he submits that he has established a basis for taking accounts in view of the provisions of Order 20 rules 2, 3 and 5 of the Civil Procedure Rules 2010.

The 1st Defendant on his part submits that the plaintiff has no *locus standi* as he is the owner of the suit property and he is not a spouse to the plaintiff in the main suit. Secondly, the 1st Defendant argues that the application for injunction is *res-judicata* as the plaintiff in the original suit filed an application dated 5/9/2013 seeking among others an order for injunction against the 1st Defendant, and the plaintiff in the counter claim herein who stated in an affidavit that he was not opposed to the application for injunction and therefore the matter was heard and determined hence the application for injunction is *res-judicata*.

On the threshold of granting temporary injunctions set out in the *locus classicus* case of **Giella -vs- Casman Brown 1973 E.A 358**, the respondent (1st Defendant) submits that the matter placed before court by the plaintiff does not lead to a conclusion that there exists a right which has apparently been infringed, they call upon the 1st respondent to answer. The 1st Defendant (respondent) in essence submits that there is no evidence in form of cheques or banking slips as evidence that the money has been paid other than the report. The respondent submits ultimately that the applicant has not established a *prima facie* case with a probability of success.

On the 2nd limb, the respondent argues that the plaintiff has not demonstrated that he is likely to suffer, irreparable injury which cannot be adequately compensated by an award of damages. The respondent argues that the applicant is not the registered owner of the property hence cannot suffer injury.

Moreover, the Respondent argues that she is a financial institution in Africa and Europe with a solid financial base hence will not experience difficulty in refunding the 2nd Defendant if it was found that he overpaid the amount.

On balance of convenience, the respondent argues that it tilts towards not granting injunction as doing so will occasion injustice to the respondent because the plaintiff is hopelessly in arrears.

On the financial report, he argues that it has no probative value and should be disregarded.

DETERMINATION

The 1st issue to be addressed by the court is *locus standi*. The charge was executed by Jacob Kipsum Arap Ngeny as the chargor, John Kiprugut Kurgat as the borrower and N. N. Shah as the Director and secretary of the 1st Defendant in respect of property title number Tulwet Block 7(Terige)/57 as the charged property. This court finds that though the form of acceptance of the letter of offer was duly executed by John Kiprugut Kurgat, Jacob Kipsum Arap Ngeny and Managers of Fina bank the suit property does not belong to the plaintiff applicant in the counter claim, and though the owner is a party to

the suit and has challenged the intended exercise of the statutory power of sale by the bank, the applicant has not shown that if the injunction is not granted he will personally suffer any loss or irreparable loss that cannot be compensated with damages, so that even if the suit property is sold, the applicant will not lose any proprietary right to the property and in the circumstance, if the suit succeeds damages would be the only relief appropriate to the applicant if it is not said that the Respondents' bank has no means to pay compensation that may be ordered. On this issue the court finds that the plaintiff applicant has no *locus standi*.

The second issue is whether the principle of *res-judicata* applies in this case thus whether the plaintiff is prohibited from applying for injunction having participated in the application for injunction dated 5/9/2013.

Section 7 of the CPA provides no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The makers of the civil procedure Act deemed it proper to give explanations of *res-judicata* as follows;

Explanation. —(1)The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2)For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3)The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4)Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5)Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6)Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The first condition to be satisfied for this principle to apply is that there must be a former suit (application) in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. This court finds that the parties in the counter-claim and in the original suit are the same save that they have just switched positions and that the issues in the original suit and the counter claim are the same as in the former application which has been decided. In the former suit it was intended to stop the 1st defendant from exercising the statutory power of sale whereas the current application intends to do the same though the plaintiff who was a defendant in the former proceedings and participated therein or was given an opportunity to do so has been a party in the proceedings herein from the 5/9/2013. He has participated in the application for injunction dated 5/9/2013 and therefore the first condition set out in section 7 of the CPA has been satisfied thus sameness of parties and issues. The parties are litigating in the same court of competent jurisdiction to try the subsequent suit in which the same issues have been raised. Ultimately, this court finds that the issues raised by the applicant were finally decided when the court allowed the respondents to proceed with the process of sale with as long as it followed the right procedure. Having found that the plaintiff has no *locus standi* and that the application is *res-judicata*, then do I need to delve into the principles of temporary injunction which were set out in the case of *Giella -vs- Casman Brown (1973) EA 358? I think it is not necessary as the two points determines the application in limine.*

However, for avoidance of doubt I do find that the applicable principles for the grant of temporary injunctions were so well settled in *GIELLA V CASMAN BROWN* thus:-

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; and

c) -when the court is in doubt, it will decide the application on the balance of convenience.

In Mrao Ltd -VS- Int. American Bank Of Kenya Ltd & 2 Others 2003 Oklr.

It was held by the court of appeal that a *prima facie* case in civil matters is a case in which on the material presented on 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.

The question I should ask myself is, has the plaintiff in the counter claim established a *prima facie* case with a probability of success? This court finds that the plaintiff in the counter claim is the borrower whilst 1st Defendant was the chargee and the plaintiff in the original suit was the chargor. The charge was in respect of the property known as Tulwet/Tulwet Block 7 (Terige) 57 which I have found that does not belong to the plaintiff. As found in *Mrao's Case*, a *prima facie* case is more than an arguable case as in the former one has to establish an existing right that has been infringed whilst in the later one only needs to raise arguable issues.

In the plaint dated 5/9/2013 and filed on the same date, the plaintiff therein averred that the 2nd Defendant (plaintiff herein in counter claim) took a loan of Ksh.5,000,000/= where the plaintiff was the guarantor and charged his property to the 1st Defendant. The 2nd Defendant (plaintiff) became very recalcitrant in repaying the said loan when there was there was a balance of Ksh.3,537,346/=, and that the plaintiff's property was in danger of being sold.

This was an admission by the plaintiff that the 2nd Defendant (plaintiff herein) was owing money to the bank.

The 2nd Defendant in defence dated 12/9/2013 averred that the plaintiff had no right of action against him prior to settling the amount of money he bound himself in the guarantee contract. He does not deny owing money to the bank as alleged to the plaintiff.

From the foregoing, the second defendant's claim that he is not owing any money to the 1st Defendant does not hold water because he never denied the allegation by the plaintiff and that he has not shown this court any evidence of payment of the outstanding balance. On whether accounts should be taken between the 2nd Defendant and the 1st Defendant in respect of Current account No.1711800213 and loan account No 1774100022 by an independent certified Public Accountant, the court holds that it is not the duty of the court to supervise the taking of accounts between the 2nd Defendant and the 1st Defendant.

On allegation of absence of a valid statutory notice, this court finds that the annexed copy of statutory notice dated 18/1/2013 certificate of postage are on record. Moreover, when the plaintiff in the original suit came to court on 5/9/2013, there was no complaint that they did not receive Notice hence the complaint on notice is an afterthought.

On the issue of Statutory, Notice was not served upon the spouse of the chargor as required by the Land Act 2012. I do find that the 2nd Defendant has not established that the suit is matrimonial property and that even if it was matrimonial property, whether the prior consent of the spouse was obtained before the property being charged. Even if it was so, neither the plaintiff in the original suit nor his spouse had deponed that the consent of spouse was not obtained and that notice was not served upon the spouse.

On the issue of a valid chargee's interest, I do find that, there is valid chargee's interest as the chargee's is

annexed on the Supporting Affidavit was duly executed and created rights and liabilities.

In ***Mrao Ltd -vs- Int. American Bank Ltd***, it was held the circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

“725 When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”(emphasis added).”

I do hold that a dispute as to the amount owing is not a ground for granting of injunction. On whether the applicant is likely to suffer irreparable herein which cannot be compensated by an award of damages adequately, I do hold that, the alleged overpayment has been quantified and therefore can be compensated. Moreover, the applicant has not discharged his burden of proof that the 1st Defendant will not be able to refund the overpayment if the suit succeeds.

On the balance of convenience, I do find that the plaintiff and 2nd Defendant (plaintiff) having admitted that they were owing the 1st Defendant, the balance of convenience tilts towards not granting the injunction.

In conclusion, I do find the 2nd Defendant's (plaintiff in the counter-claim) application dated 19th May 2015 is not merited and the same is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 2ND FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE