



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 290 OF 2014

JOSEPH OCHIENG OMONDI.....PLAINTIFF

VERSUS

EQUITY BANK LTD.....1ST DEFENDANT

VINCENT OLOO ODUOR.....2ND DEFENDANT

KEYSIAN AUCTIONEERS.....3RD DEFENDANT

IGARE AUCTIONEERS.....4TH DEFENDANT

RULING

The application is dated 18.11.2014 and brought by way of Notice of Motion. Wherein the applicant prays for an order that that pending the hearing and determination of the suit herein, there be temporary orders of injunction restraining the defendants/respondents by themselves, their agents, servants, employees and/or otherwise howsoever from advertising for sale, disposing of, auctioning, transferring, evicting the Plaintiff/Applicant therefrom or in any other manner interfering with the Plaintiff's possession/occupation and/or ownership of title No. Eldoret Municipality/Block 20 (Kapyemit) 648 measuring zero decimal one three (0.13) hectares or thereabouts.

The application is based on grounds that the 2nd defendant/respondent borrowed a loan in the sum of Kshs.720,000/= from the 1st defendant/respondent which the plaintiff guaranteed using his title deed No. Eldoret Municipality/Block 20 (Kapyemit) 648. The plaintiff was not issued with any notice regarding the 2nd defendant/respondent default in servicing the loan and that the notification by the 3rd defendant and/or 4th defendant under the instructions of the 1st defendant is irregular. The plaintiff has been kept in the dark by the 1st defendant/respondent regarding the loan and/or payment thereof. The 2nd defendant/respondent has so far paid substantial sum of Kshs.515,000/= to the 1st defendant which was deducted from his account. The plaintiff/applicant is willing to repay any outstanding loan upon proper information by the 1st defendant. The loan balance of approximately Kshs.300,000/= is not commensurate with the security which stands at approximately Kenya Shillings Two Million Five Hundred Thousand (Kshs.2,500,000). That unless urgent orders are made, the plaintiff/applicant is likely to suffer irreparable loss as the property due for auction is his only source of livelihood and shelter and this shall further result in family disintegration. Therefore it is in the interest of justice that this application be allowed in favour of the plaintiff/applicants. The court has powers to grant the orders sought in the interest of justice and that no prejudice will be suffered if the orders sought herein are granted.

The application is supported by the affidavit of Joseph Ochieng Omondi who states that he is the registered owner of Eldoret Municipality/Block 20(Kapyemit) 648 measuring 0.13 hectares on which he has constructed his matrimonial home.

That on or about 11th January, 2012, the 2nd defendant applied for a loan facility from the 1st defendant to the tune of Kshs.720,000/= to enable him purchase goods for his wholesale shop and requested him to provide his title as security. The 2nd defendant continued to update him as far as servicing of the loan account is concerned upto November, 2013 when the loan balance was standing at Kshs.330,000/= and this demonstrated to him that the 2nd defendant was determined to fully service the loan.

The 1st defendant failed to advise him accordingly when the 2nd defendant defaulted in servicing the loan account and he has all along not been aware of any default by the 2nd defendant as far as servicing of the loan was/is concerned. The 2nd defendant agreed that he would pay and satisfy the 1st defendant on demand all and every amount of money which would be owing to the 1st defendant with all interest thereon from the date of demand until payment in full and it has been without his knowledge that the 2nd defendant has defaulted in finalizing the 1st defendant loan account as agreed.

That on or about 5th September, 2014, the 3rd defendant agent and/or servant and/or employee visited his premises on the said parcel of land alleging that they had authority from the 1st defendant to sell land parcel No. Eldoret Municipality/Block 20 (Kapyemit) 648 which was used as a security to recover the balance due in regard to loan granted to the 2nd defendant and thus a buyer had been identified and brought to inspect the same. He visited the 1st defendant Mumias Branch to confirm the position of the loan account. It is at this point when he was handed a copy of notification of sale of immovable property over land parcel number Eldoret Municipality/Block 20 (Kapyemit) 648 by the 1st defendant branch that they are exercising their statutory obligations.

Inspite of all these, he tried to co-operate with the 1st defendant to get to know how much was paid by the 2nd defendant up to the time of issuance of notification of sale and how much was due on the loan account and whether he can be accommodated to pay the balance due if any, in monthly instalments until payment in full. That the 1st defendant was adamant, ignorant and persistently refused to give him clear information on the position of the loan account. That he is willing and ready to pay the loan balance, if any provided that the 1st defendant avails a copy of the amount and/or statement of accounts confirming the amount so far paid by the 2nd defendant and the balance thereof and that he should be given sufficient notice as required under the law. That on 15.9.2014, he was shocked to learn that the 1st defendant through its agents, the 3rd defendant has published in the Daily Nation Newspaper that his property land parcel Number Eldoret Municipality/Block 20 (Kapyemit) 648 is due for auction.

He is informed by his advocate on record, Mrs. Victoria C. Lagat, which information he verily believe to be true that the 1st defendant acted in disregard of the law and in breach of his rights under the said guarantee as he was never served with any statutory notice as required by the law. That the 3rd defendant, purported notification of sale and auction is without regard to the amount so far paid to the 1st defendant by the 2nd defendant.

On 16.9.2014, he made further visit to the 1st defendant Branch in Mumias. He was shocked when he was informed by the Credit Manager that the amount due on the loan account is Kshs.250,000/=. He was as well informed that the 2nd defendant requested for an overdraft facility of upto Kshs.500,000/=. which request was granted to the 2nd defendant and therefore, the balance due on the overdraft is Kshs.550,000/=. The overdraft facility granted to the 2nd defendant pushed the total amount due on the loan account to Kshs.800,000/= and this is what the 1st defendant is asking for as the balance due and owing on the loan account.

The defendants' acts are tainted with illegality and malice by failing to inform him about the correct amount outstanding on the loan account and failing to notify him when the 2nd defendant defaulted in servicing the loan. The applicant believes that by failing to issue him with any notice and/or statutory notice thereof and taking steps to auction his property in disregard to the law the 1st respondent has breached the law.

The applicant further alleges that by failing to update him as is required by the law under the said guarantee and allowing the 2nd defendant an overdraft without his knowledge and/or consent was an illegality committed by the 1st respondent.

He stands to suffer substantially and irreparably if the land is sold, which is his matrimonial home. That he now seeks an injunction to restrain the defendants, their agents, servants, and/or employees from selling, auctioning, disposing, dealing with or in any other manner interfering with his property. Notwithstanding his repeated requests to the 1st defendant to issue him with the statements of account in order to proceed with repayment of the loan, the 1st defendant has ignored, neglected and/or refused to allow him a chance to repay by monthly instalments any sum and/or monies that may be due as the balance of the loan account secured by the 2nd defendant. That the current value of the suit property is over Kshs.2,500,000/= and if the same is sold, he will be rendered homeless and suffer a great loss. That he is also bound to lose his only matrimonial home which will affect his family values, integrity and stability. That his family by virtue of staying in the cold shall be exposed to vagaries of nature and climate change.

The 1st respondent through Johnson Cheserek, the Credit Manager swore an affidavit stating that the plaintiff is guilty of material non-disclosure and is frustrating the course of justice. He depones that by a letter of offer dated 10th November, 2011, the 1st defendant, Bank advanced Kshs.720,000/= to the 2nd defendant to be secured by a personal guarantee of Joseph Ochieng Omondi supported by a charge in favour of the 1st defendant over property Eldoret/Municipality/Block 20 (Kapyemit) 648. That is loan was re-phased on 24th January, 2012 to loan account No. 0680598738112. That subsequently thereto, the 2nd defendant started defaulting in the repayment and there is currently an outstanding amount of Kshs.357,078/= as to 29th September, 2014.

On or around 22nd October, 2012, the 2nd defendant deposited cheque worth Kshs.500,064/= and the bank advanced cash equivalent to the cheque amount. The cheque was dishonoured leading to an overdraft position. That subsequently thereto, the 2nd defendant did not pay the overdrawn amount and as it stands, the current outstanding balance which arose from the transaction is Kshs.537,816.42 as at 1st October, 2014. The total outstanding liability owed to the 1st defendant by the 2nd defendant is Kshs.894,894.42 which is a consolidation of the overdraft cheque amount and the loan.

The 2nd defendant defaulted in the repayment of the loan prompting the 1st defendant to commence the security realization process. In the furtherance of the above, the 1st defendant issued a demand notice dated 17th September, 2013, which was sent to the 2nd defendant with a separate copy to the plaintiff. That the 2nd defendant failed to regularize his account prompting the 1st defendant to issue a 90 days notice to sell dated 7th February, 2014 and addressed to the 2nd defendant separately with copied to the plaintiff. The said notice were sent to the plaintiff's correct address as indicated in the documents availed to the 1st defendant.

The notice period expired in May, 2014 but the 1st defendant in an act of good faith allowed the plaintiff and the defendant further time to redeem the property which they failed and as such any claims to the contrary are purely meant to mislead this honourable court. That subsequently thereto, the 1st defendant issued instructions dated 16th July, 2014 to the 3rd defendant to proceed with the sale of the property in compliance with the provisions of the law. He states that the plaintiff was not aware of the demand notices issued to him and at no time was he denied access to information in respect of the loan. He states further that the plaintiff has not been willing to pay the loan balance. He ignored the statutory notice and never made any effort to pay outstanding amount. The deponent further states that the court is not the appropriate forum to re-negotiate the repayment schedule or period or any other term of the charge.

The plaintiffs have contended that indeed the 2nd defendant is indebted to the 1st defendant, he has demonstrated amply that the suit has no probable chances of success. The guaranteed property ought to be made a commodity for sale for purposes of recovery of the debt.

That he is informed by his advocates on record aforesaid, which information he verily believe to be true, that damages is an adequate remedy herein. Further, the fact that the plaintiff allowed his property to be

charged meant that he converted it into a commodity for sale and hence cannot suffer any loss which cannot be adequately compensated by damages. That the Applicant comes to this Honourable court with unclean hands as he has concealed from this honourable court information material and relevant to the determination of the said application especially the issue of indebtedness of the 2nd defendant and the service of the demand notice and other correspondence.

That he avers that the grant of orders sought in the said application would greatly prejudice the 1st defendant as there is a very real risk that the debt may outstrip the value of the suit property, as the 2nd defendant has never made repayments for more than six months. The stoppage of the intended sale by the plaintiff would result in the continued growth of the debt and thus exposing the 1st defendant to potentially substantial irrecoverable losses.

Time and again, this court has dealt with such applications and has applied the principles of *Giella v. Cassman Brown* [1973] EA 358 in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of *Mrao v First American Bank of Kenya and Two Others* [2003] KLR 125, a prima facie case was described as:-

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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 “.

The plaintiff must demonstrate a prima facie case with a probability of success and that if a temporary injunction is not granted the plaintiff will suffer irreparable injury that cannot be compensated by damages. Last but not least if the court is in doubt the it can make decision based on balance of convenience

The plaintiff argues that the statutory notice were addressed to P. O. Box 132, Butula instead of P. O. Box 798, Eldoret, which documents were returned as unclaimed. On this issue, the court finds that the statutory notice was delivered to the postal address supplied by the plaintiff. The notification of sale and redemption notice were also delivered to the address supplied by the applicant. There is no notice of change of address and therefore the 1st and 3rd defendant cannot be faulted on the process of recovery of the facility.

However, the court finds that the allegation that the plaintiff had no business in the ***overdraft offered*** by the 1st defendant to the 2nd defendant raises ***a prima facie*** case with a probability of success as the plaintiff did not sign for the overdraft. On the issue of ***irreparable loss***, I do find that if the plaintiff's property is sold, the plaintiff is likely to suffer irreparable loss as the same is his only source of livelihood and matrimonial home. The court is not in doubt and therefore, does not need to consider the balance of convenience. Ultimately, the application is allowed. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE