



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 524 OF 2016**

**ALEXANDER SOMBOL NAHASHON.....PLAINTIFF**

**VERSUS**

**KENYA COMERCIAL BANK KENYA LIMITED.....1<sup>ST</sup>DEFENDANT**

**GALAXY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before me is the plaintiff's application dated 16<sup>th</sup> May 2016 seeking an order of injunction to restrain the defendants from auctioning or in any manner dealing with all those parcels of land known as LR No. Ngong/Ngong/56272 and LR. No. Ngong/Ngong/56041 ("the suit properties"). The plaintiff's application was brought on the grounds that the plaintiff had Charged the suit properties in favour of the 1<sup>st</sup> defendant to secure loan facilities which were advanced by the 1<sup>st</sup> defendant to one, Bishar Mohammed Isaac ("the principal debtor"). The Plaintiff has contended that the principal debtor has defaulted in his loan repayment obligations to the 1<sup>st</sup> defendant and that a sum of Ksh.902,457/= is due by the principal debtor to the 1<sup>st</sup> defendant. The plaintiff has contended that the 1<sup>st</sup> defendant has now advertised the suit property for sale on 27<sup>th</sup> May 2016 through the 2<sup>nd</sup> defendant. The plaintiff in his capacity as the guarantor of the loan and chargor in respect of the suit properties which are scheduled for sale has come to court to stop the intended auction of the suit properties to enable him pay the amount due to the 1<sup>st</sup> defendant. The injunction is sought for a period of 90 days within which the plaintiff would have paid to the 1<sup>st</sup> defendant the outstanding amount. In his affidavit in support of the application, the plaintiff has stated that he stood as a guarantor to the principal debtor in respect of a loan which the principal debtor obtained from the 1<sup>st</sup> defendant and which was secured by the suit properties. The plaintiff has stated that the loan that was advanced to the principal debtor remains unpaid to the tune of Kshs.902,457/= and that the principal debtor has gone underground and as such he is nowhere to meet his obligations. The plaintiff has stated that he has been forced to look for money to pay the outstanding loan amount to the 1<sup>st</sup> defendant so as to redeem the suit properties which are valued at Kshs.5,500,000/=. It is on account of the foregoing that he has sought an order to stop the sale of the suit properties scheduled for 27<sup>th</sup> May 2016 so that he may get time to look for money to settle the debt due to the 1<sup>st</sup> defendant.

The application was opposed by the defendants through grounds of opposition dated 20<sup>th</sup> May 2016. The defendants have contended that the Plaintiff's application lacks merit and is an abuse of the process of the court. The defendants have contended that the plaintiff has not satisfied the conditions for granting interlocutory injunction and as such cannot benefit from the orders sought.

When the application came up for hearing on 23<sup>th</sup> May 2016, Mr. Moseti appeared for the Plaintiff while Mr. Chege appeared for the defendants. In his submissions in support of the application, Mr. Moseti

reiterated the grounds on which the application was brought and the contents of the affidavit of the plaintiff that was filed in support of the application. Mr. Moseti submitted that the 1<sup>st</sup> defendant has refused to give the plaintiff more time to pay the outstanding debt and is interested on proceeding with the sale of the suit properties scheduled for 27<sup>th</sup> May 2016 unless stopped by this court. He submitted that if granted 90 days, the plaintiff would be able to redeem the suit properties by paying the outstanding debt due to the 1<sup>st</sup> defendant. Mr. Moseti urged the court to apply equity rather than law when considering the plaintiff's application.

In his submission in reply, Mr. Chege submitted that there is no basis disclosed in the application by the plaintiff on which the injunction sought can be granted. Mr. Chege submitted that if the court was to grant the injunction sought and give the plaintiff the 90 days he is seeking to pay to the defendant the outstanding loan amount, the court would be re-writing the agreement that was entered between the plaintiff and the 1<sup>st</sup> defendant, whereby in default of payment of the loan amount, the 1<sup>st</sup> defendant was entitled to sell the suit properties. In support of this submission, Mr. Chege cited the case of **Kundan Sighn Construction International Ltd Vs. Bank of Africa Kenya Ltd. & Another (2015) eKLR**.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the defendants in opposition to the application, and the respective submissions by the advocates for the parties. I am in agreement with the defendants' advocate that the plaintiff's application lacks merit. The Plaintiff has not established a prima facie case against the defendants on the basis of which the injunction sought can be granted. The Plaintiff has admitted that he Charged the suit properties to the 1<sup>st</sup> defendant to secure a loan facility that the 1<sup>st</sup> defendant had advanced to the principal debtor. The plaintiff has admitted that the principal debtor has defaulted in the payment of the loan that was advanced to him and that a sum of Kshs.902,457/= is due by the principal debtor to the 1<sup>st</sup> defendant. The Plaintiff has admitted that as Chargor he was served with the requisite notices to pay the said outstanding amount in default of which the suit properties would be sold by public auction to recover the same. The plaintiff has admitted that he has not paid the amount that was demanded as he has no money which can settle the debt immediately. The plaintiff has not pointed out any wrong which has been committed by the defendant which would call for this suit and the injunction sought.

For the Plaintiff to get the interlocutory injunction sought, he must demonstrate that he has good prospects of obtaining a permanent injunction at the trial. For the reasons which I have given above, I see no such prospect. In any event the plaintiff has not even sought a permanent injunction in the plaint. In **Snell's Equity, 29<sup>th</sup> Edition at page 648**, the authors have stated as follows on general principles relating to perpetual injunctions;

**“A perpetual injunction is granted only when the party who seeks it has a cause of action (which includes statutory as well as private rights of action) justiciable before the court, and in order to obtain the injunction he must show either that there is an actual or threatened injury to some legal or equitable right of his or that the other party has behaved or threatened to behave in unconscionable manner.”**

I have said enough to show that the Plaintiff's application is not for granting. The Plaintiff has urged me to consider the application on equitable grounds rather than in accordance with the law. My understanding of equity is that equity follows the law and that equity will only interfere where there is some important circumstances overlooked or disregarded by the law and where lack of a remedy at law will cause in justice to a party. As I have stated above the plaintiff has established neither legal nor equitable right. The plaintiff has not contended that a wrong has been committed against him and that he has no remedy at law. The court cannot therefore invoke equity where there is no gap in law.

For the foregoing reasons, I find no merit in the Plaintiffs application dated 16<sup>th</sup> May 2016. The same is accordingly dismissed with costs to the defendant.

**Dated and Delivered at Nairobi this 27<sup>th</sup> day of May, 2016**

**S, OKONG'O**

**JUDGE**

**In the presence of**

Mr. Moseti                      for the Plaintiff

Mr. Chege                      for the Defendants

C. Kajuju                      Court Assistant