



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 124 OF 2015

DR. SOLOMON OMWEGA OMACHE 1ST PLAINTIFF

BOSONGO MEDICAL CENTRE LIMITED 2ND PLAINTIFF

VERSUS

ZACHARY O. AYIEKO 1ST DEFENDANT

VINCENT K. AYIEKO 2ND DEFENDANT

LYDIA BOSIBORI MOMANYI

T/A MAINSTREAM WELFARE ASSOCIATION 3RD RESPONDENT

RULING

1. The plaintiffs vide a plaint dated 30th March 2015 filed the instant suit against the defendants where inter alia the plaintiffs pray for a declaration that the charge instrument registered over land parcel LR No. **Central Kitutu/Daraja Mbili/3132** on 4th to April 2012 was fraudulent, irregular, illegal and invalid. The plaintiffs further pray for an order to discharge the charge unconditionally.
2. Simultaneously with the plaint the plaintiffs filed a Notice of Motion application expressed to be brought under order 40 Rules 1, 2, 4 and 10 Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) Civil procedure Act Sections 90 (2), 96 (2) and 97 of the Land Act, 2012 and Section 2 of the Banking Act, Cap 488 Laws of Kenya and seeks the following principal order:-

“The Honourable Court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by themselves, agents, servants and/or anyone claiming under the said defendant/ respondent, from exercising the statutory power of sale over and in respect of LR No. Central Kitutu/Daraja Mbili/3132, (hereinafter referred to as the charge property”) and in particular, advertising for sale, selling vide public auction and/or private treaty, currently scheduled on the 27th day of April 2015 or any other date, disposing of transferring, leasing, alienating, clogging and/or in any manner interfering with the 2nd plaintiff’s/applicant’s rights and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.”

3. The plaintiffs’ application is premised on the grounds that appear on the face of the application and on the supporting affidavit sworn by Dr. Solomon Omwega Omache, the 1st plaintiff herein on 30th March 2015. The 2nd defendant is the registered owner of land parcel **LR No. Central**

Kittuu/Daraja Mbili/3132 (“the charge property”) whereupon a medical facility known as “**Bosongo Medical Centre**” has been developed and that 1st plaintiff is the managing director of the facility. As such Managing Director the 1st plaintiff sought and obtained a financial facility of kshs. 7,000,000/= from the 3rd defendant, Mainstream Welfare Association. To secure the loan facility the 3rd defendant took a charge over **LR No. Central Kitutu/Daraja Mbili/3132** and in terms of the charge the 3rd defendant was to charge interest on the sums advanced at the rate of 24% p.a. The plaintiffs aver that they have repaid the 3rd defendant the sum of kshs. 3,350,000/= but that notwithstanding, the plaintiffs state that the defendants on 16th February 2015 prematurely issued to the plaintiffs a notification of sale and had the sale of the charge property scheduled on 27th April 2015.

4. The plaintiffs aver that the defendants are not entitled to exercise their statutory power of the sale under the charge as that right had not accrued. The plaintiffs state no statutory notice of the intention to sell had been served on them as required under the law. The plaintiffs argue the intended sale of the charge property is in contravention of Sections 90, 96 and 97 of the Land Act No. 6 of 2012 as the requisite notices required under those provisions had not been served. The plaintiffs have further contended the defendant not being a registered bank or financial institution could not legally levy or charge interest on the money advanced to the plaintiffs.
5. The 1st plaintiff’s affidavit in support of the plaintiffs’ application reiterates the grounds set out in support of the application. The deponent under paragraphs 7, 8 and 9 of the supporting affidavit avers that the defendant was not licenced to undertake banking business and it was therefore illegal for the defendant to purport to do business that was the preserve of institutions licensed by the Central Bank of Kenya to carry on banking business. The deponent further states at paragraphs 16, 17 and 18 that the alleged statutory notice issued on 26th October 2014 was never served on the 2nd plaintiff as the same was mailed to the wrong address and could not have been received by the 2nd plaintiff. The deponent thus avers in the absence of a proper statutory notice having been issued there was no basis for the defendants to instruct the auctioneers, M/s Colinet Auctioneers, to issue a notification of sale of the charge property on 27th April 2015 as they did and contends the notification of sale was premature.
6. The 3rd defendant, through Zachary O. Ayieko, its Chariman swore a replying affidavit dated 4th May 2015 in opposition to the plaintiffs’ application for injunction. The defendants affirmed that the plaintiffs applied for a loan facility from the 3rd defendant in 2011 and that the defendants granted the plaintiffs a loan facility of kshs. 2,458,801 between April, 2011 and September 2011. The defendant states that this amount had by reason of default in servicing and accrual of interest increased to kshs. 2,920,639.05 as at 30th April 2012 as per statement of account annexed and marked “**ZOA (a)-(b)**”. The defendants further on 11th April 2012 disbursed to the plaintiffs an additional sum of kshs. 4,012,450.00. the plaintiffs offered the charge property as security for all the sums advanced to the plaintiffs and which sums were to accrue interest at 24%p.a. The defendants aver the amount secured under the charge dated 4th April 2012 was to be repaid within 18 months but the plaintiffs defaulted in repayment prompting the defendants to take the appropriate steps to realize the security.
7. The defendants state that the firm of M/s Naikuni, Ngaah and Miencha & Co. Advocates issued the plaintiffs with the statutory notice dated 29th October 2014 which the 1st plaintiff acknowledged receipt and even contacted the defendants sometime in November 2014 requesting to be accommodated to enable the plaintiffs make alternative arrangements to get another lender to take up the loan on a longer term basis. The defendants further aver that although the statutory notice of 29th October 2014 indicates the address of the plaintiffs as “**P.O Box 220-40200 Nairobi**” the envelope was properly addressed “**P.O Box 2200-40200 Kisii**” as per annexure “**ZOA-9**”. The defendants aver that they have complied with the provisions of the Land Act No. 6 of 2012 as relates to service of notice and it is their contention that the plaintiffs have not demonstrated a prima facie case with a probability of success to warrant the court to grant them an order of temporary injunction.
8. The parties filed written submissions to canvass the plaintiffs’ application. The defendants’ submissions were filed on 21st December 2015 while the plaintiffs’ submissions were filed on 1st

March 2016. I have reviewed and considered the pleadings, the plaintiffs application and the affidavit in support and in opposition together with the annexures thereto, and the submissions by the parties and indeed the issue for determination at this stage is whether the plaintiffs have satisfied the conditions for granting an injunction as established in the case of **Giella –vs- Cassman Brown & Company Ltd [1973] E. A 358**. In the case the court established the principles/conditions to be considered in granting an interlocutory injunction thus:

- i. **An applicant has to establish and/or demonstrate he has a prima facie case with a probability of success.**
- ii. **An applicant must demonstrate that he stands to suffer irreparable damage not compensatable by an award of damages unless the injunction is granted.**
- iii. **In case the court has any doubt in regard to any of the above two conditions it can determine the application on consideration of the balance of convenience.**

9. The applicant has averred that the 2nd plaintiff who is the chargor was not served with the requisite statutory notice as required under Section 90 (1) of the Land Act, 2012 and further no appropriate notice of intention to sell the charge property was served under Section 96 (2) of the Land Act, 2012 as required and has submitted that consequently the right to offer the land for sale had not crystallized. The plaintiffs have additionally submitted that the defendant was not licenced to carry banking business and therefore could not lawfully charge interest on the money advanced to the plaintiffs.

10. In the present matter even if it is shown the plaintiffs were served with the statutory notice dated 29th October 2014 (which the plaintiffs deny) the defendants have to show the plaintiffs were additionally served with a notice of intention to sell the charge property under Section 96 (2) of the Land Act, 2012. In the case of **Musa Angira Angira –vs- ICDC Kisii HCCC ELC No. 217 of 2014** (unreported) this court had occasion to consider the application of Sections 90 (1) and 96 (2) of the Land Act, 2012 and the court in a ruling delivered on 4th December 2015 rendered itself thus:

“Section 96 (1) of the Land Act, No. 6 of 2012, quite clearly envisaged the prior service of the Notice under section 90 (1) before the notice contemplated under section 96 (2) may be served on the chargor. I have reviewed this matter and considered the notices attached to the defendants’ replying affidavit and I am not persuaded that the defendants complied with Section 96 (2) before proceeding to have the property offered for sale by the Auctioneers. Without service of the Notice under Section 96 (2) of the Land Act, No. 6 of 2012, the defendant would not have been entitled to sell the charged property and on this account, I am persuaded that the plaintiff has established a prima facie case within the meaning of what constitutes a prima facie case as defined in the case of **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125”.**

11. I think the above observation apply in equal to force the circumstances of the present case. The defendants have not in my view demonstrated that the plaintiffs were served with a notice as required under Section 96 (2) of the Land Act, 2012. Section 96 (2) provides:-

96 (2) Before exercising the power to sell the charged land the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

12. The plaintiffs have annexed a notification of sale issued by the auctioneer pursuant to Rule 15 (b) of the Auctioneers Rules 1997 marked **“DS003”**. This does not qualify to be a notice under Section 96 (2) of the Land Act, 2012 as it clearly states it is issued under the Auctioneers Rules 1997 and in my view could only have come after a notice under Section 96 (2) of the Land Act, 2012 had been issued and the chargor had failed to comply with the same.

13. The plaintiffs other issue that the defendants are not authorized to operate as a banking institution in charging interest on its loans is a matter that is in contest between the parties and being a

- substantive issue that goes to the substratum of the claim by the defendants, I am of the view should be left to be canvassed at the trial. I do not wish to make a determination at this point which could be prejudicial to either of the parties during the trial.
14. From my earlier observations in regard to service of appropriate notices under the Land Act, 2012 it should have become clear that I have held the view that no appropriate notice under Section 96 (2) had been served on the plaintiffs by the chargee as they were required to do before instructing the Auctioneers to offer the charge property for sale through realization through auction. On this account therefore it is my holding that the plaintiffs have demonstrated a prima facie case with a probability of success. That, however, is not to say the plaintiffs do not owe the defendants money. They do, although the quantum may be in dispute. They would be advised to continue servicing the loan.
 15. Before I conclude this ruling I have something to say about the defendants replying affidavit. The replying affidavit sworn by Zachary O. Ayieko on 4th May 2015 is shown to annex up to 11 attachments or exhibits. These exhibits are not identified and/or marked and neither have they been sealed with seal of the commissioner for oaths. The exhibits one may say have been thrown at the court and it is left up to the court to flip through them to determine which one relates to what. I do not think that is what the case should be.
 16. Rule 9 of the Oaths and Statutory Declarations Rules requires that annexures to affidavits should be sealed and stamped. The rule reads;-

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”

Hon. J. B Havelock J. (as he then was) in the case of **Fredrick Mwangi Nyaga –vs- Garam Investments & Another [2013] eKLR** had occasion to consider the application of the above Rule 9 of the Oaths and Statutory Declarations Rules. The judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by **Hayanga J.** (as he then was) in the case of **Abraham Mwangi –vs- S. O Omboo & Others HCCC No. 1511 of 2002** where the judge had held thus:-

“Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected...”

17. Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence.
18. I must nonetheless state that even if the exhibits had been properly marked and sealed and I had taken the same into account that would not have affected my holding that the plaintiffs had established a prima facie case it having not been shown that a proper notice under Section 96 (2) of the Land Act, 2012 had been served before the auctioneers were instructed. The 2nd plaintiff is running a medical facility on the charge property and would undoubtedly be exposed to damage that may not be compensatable in damages if the property is sold as intended by the defendant and the business is ruined.
19. In the result I find the plaintiffs’ application dated 30th March 2015 to have merit and I grant an injunction in terms of prayer (3) of the Notice of Motion. The costs of the application are awarded to the plaintiffs.

Ruling dated, signed and delivered at Kisii this 6th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

Mr. Mung'aro for the 1st and 2nd plaintiffs

Mr. Oguttu for the 1st, 2nd and 3rd defendants

Milcent Court assistant

J. M. MUTUNGI

JUDGE