REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 228 OF 2015

EUNICE JEMTAI KOMEN...PLAINTIFF

VERSUS

AMOS KIPCHUMBA TENAI...1ST DEFENDANT

EQUITY BANK (K) LIMITED...2ND DEFENDANT

DOMINION YARDS AUCTIONEERS...3RD DEFENDANT

AND

RAYMOND KIPKOECH KUTO...INTERESTED PARTY

RULING

The plaintiff seeks an order of injunction restraining the defendants, their agents, servants, employees and/or any other party acting on their behalf from trespassing onto, entering into, foreclosing, auctioning, selling by private treaty and or in any manner dealing with the plaintiff's property **Pioneer/Ngeria Block EATEC/3580** or in any way disposing off or dealing with the plaintiff's property aforesaid pending the hearing and determination of the suit. The application is based on grounds that the plaintiff is the owner of the suit property. The 2nd defendant is threatening to auction the plaintiff's property despite the fact that outstanding figures does not tally with money demanded. The plaintiff stands to suffer irreparable harm in the event that the matrimonial home is sold.

The application is supported by the affidavit of Eunice Jemtai Komen who states that at all the material times, she is the sole registered owner of all that land parcel known as Pioneer/Ngeria Block EATEC/3580 which property stands as their matrimonial home where she resides with her husband and their children and that it is the only matrimonial home where she has been living therein for more than 10 years. Sometimes in December 2012, she stood as a guarantor to Amos Kipchumba Tenai, where he took a loan with the 2nd defendant bank and that a first charge was subsequently registered against her property Pioneer/Ngeria Block 1 (EATEC)/3580 for the 1st defendant to obtain a loan facility of Kenya Shillings Eight Hundred Thousand Only (Kshs.800,000). The defendant has paid over Kshs.1 million towards this and he has more than a year before he clears this loan as the loan facility was to last for 3 years. The bank statement shows that the outstanding balance is now Kshs.282,420.47.

On 30th July 2015, the 1st defendant notified her that notification of sale of her property has been given to him in total breach of their agreement for he was to liquidate the loan facility and to ensure that her property is not sold out. When she confronted him, he told her that he still has one year to complete payment and that he does not understand why the bank wants to auction her property. He further showed her an undated loan account balance which shows that the outstanding sum is only Kshs.282,420.47

unlike the astronomical figure of Kshs.888,788.20 as demanded by the 3rd defendant in the notification of sale dated 12.6.2015 annexed and marked T3.

On the 13th June 2015, she went to the bank to inquire about the status of this account but the bank officials refused to listen to but instead chased her out of the bank and she believes that the defendants' actions are in contravention of section 90(1)(3) of the Land Act, 2012. It is now obviously clear that the defendants intend to have her property sold without giving her the right of redemption and without piece of notices as required by law.

The 2nd respondent filed a replying affidavit stating that the application is an abuse of the court process and is grossly defective premised on the wrong provisions of law and that the plaintiffs are guilty of material non-disclosure. The 2nd defendant states that though the plaintiff is a registered proprietor of the parcel of land, the 2nd defendant holds a chargee/chargor interest in the said parcel of land pursuant to a loan facility guaranteed by the plaintiff to the 2nd defendant. By a letter of offer dated 27th December 2012, the 2nd defendant advanced to the 1st defendant Kshs.800,000/= secured by a charge in favour of 2nd defendant securing Kshs.800,000/= over property title No. Pioneer/Ngeria Block EATEC/3580 registered in the name of the plaintiff and that loan was disbursed on 1st February 2013 to loan account No. 0300290850157 and is currently outstanding at Kshs.884,780.20 as of 12th September, 2015. It is worth noting that the loan continues to accrue interests.

The respondent believes that by the plaintiff's offering the suit land to be a guarantee to the 2nd defendant, he converted it into a commodity for sale and attached value to it hence she cannot suffer any irreparable loss or damage. The respondent further believes that the transaction was properly done as the spouse of the plaintiff herein one, Amos Tenai duly consented to the creation of the charge in writing pursuant to section 45 of the Land Registration Act. Subsequently after the loan had been disbursed, the 1st defendant defaulted in the repayment of the loan prompting the 2nd defendant to commence security realization process. Thereafter, a three (3) months demand notice dated 8th September, 2014 was sent to the 1st defendant with separate copies to the plaintiff and proof of posting obtained. The 1st defendant failed to regularize his account prompting the 2nd defendant to issue the plaintiff with a redemption notice dated 10th June, 2015 with a copy to the 1st defendant and proof of posting obtained. The 2nd defendant also issued instructions to the 3rd defendant on 10th June, 2015 to proceed with the sale of the property in compliance with the provision of the law.

The plaintiff and the 1st defendant have had ample time to redeem the suit property which they failed and as such any claims to the contrary are malicious and aimed at misleading this Honorable Court. He states that at no time has the plaintiff ever gone to the bank to inquire about the status of the 1st defendant's account nor has she ever been chased away by the 2nd defendant's employees. The allegations are meant to hoodwink this court into granting her orders because if she been chased away, she would have reported the same to him or any other Senior Official of the 2nd defendant which she did not.

That he is a stranger to the contents of paragraphs 10 of the affidavit as the 2nd defendant was not privy to the contract and/or arrangement between the plaintiff and the 1st defendant and hence cannot be bound by the non-performance of the same. That further he avers that the Bank Statutory power of sale had rightly accrued and the plaintiff ought not to be allowed to fetter this power by employing delaying tactics and obtaining orders by misrepresenting facts to this Honourable Court. That as a result of the aforementioned facts, he is advised by the 2nd and 3rd respondents' Advocates, which advice he verily believes to be true, that the applicant is not entitled to the equitable remedy she seeks as she has not done equity and has approached this court with unclean hand.

The the plaintiff admitted the fact that the 1st defendant has arrears with regards to the loan facility advanced to him and hence she is not entitled to orders by this Honourable Court. The 2nd defendant believes that the grant of the orders sought in the application would greatly prejudice the 2nd defendant as there is likelihood that the debt may outstrip the value of the suit properties and which amount continues to accrue and hence imperative for the 2nd defendant to allow to salvage what it can. The stoppage of the intended sale by the plaintiffs would result in continued growth of the debt and thus exposing the 2nd defendant to potentially substantial irreparable losses.

The Interested Party filed a replying affidavit stating that by dint of sale agreement dated 20.6.2014, the plaintiff sold the suit property to him and that he was instructed by the plaintiff to pay the purchase price through the 1st defendant's business account No. 01148442576200 (BOLLDET AGENCIES) at Co-operative Bank, Eldoret Branch and he instructed his Stima Sacco to pay by way of EFT. That the plaintiff being in breach of clause 1(c) of the said sale agreement above, he was forced to instruct his advocate to write to her. That he purchased the suit property on trust as the plaintiff and his wife, Nelly Morogo are related (cousins) and it was not until the 25.8.2015 when he got suspicious and applied for official search that he noticed that the suit land was charged to the 2nd defendant which fact the plaintiff had shielded from him. That when he came to learn that the suit property had encumbrances, he approached the 2nd defendant by presenting his proposal to redeem the property which he is yet to receive response so that he acts accordingly.

That when he noticed that the plaintiff and the 1st defendant were taking him in circles and that they were not co-operative and not telling him the truth, he reported the matter at the Eldoret Police Station whereby the plaintiff was arrested and charged but the 1st defendant is still at large.

That he confirms that the plaintiff is guilty of non-disclosure of material facts to wit;

(a) She has sold the suit land.

(b) 1st defendant is her legal husband.

(c) She has not provided evidence to prove the amount paid towards loan repayment by 1st defendant.

(d) They have criminal case at Eldoret Cmcrc No. 4795 of 2015 pending before court.

He confirms that he is willing to redeem the suit property upon being provided with loan statement as he has already heavily invested in it by paying to the plaintiff the sum of Kshs.2,300,000/= and given a chance, he will give a reasonable proposal for settlement and he believes that the plaintiff and the 1st defendant are not able to redeem the suit land and he stands to suffer irreparably if the injunction is not granted and the 2nd defendant exercises their right to sale. He believes that the replying affidavit of the 2nd and 3rd defendants is sworn by unknown person and/or a stranger as no authority and/or appointment letter has been exhibited as proof of his capacity to depose to the facts therein and that the 2nd defendant's interest over the suit property is to recover their money and once he is allowed to pay them off, they will not have further interest.

Accordingly, neither the plaintiff nor the 2nd defendant has exhibited a clear record/statement to show how much has been paid and how much owes. He believes that the charged document was not properly executed as the Bank Attorney's signature was not attested by a Commissioner for Oaths hence null and void. The spousal consent given by the 1st defendant is a general consent which does not capture the fact that the property was a matrimonial property which renders the entire instrument void.

According to the interested party, it does not make sense for the suit property which is valued at Kshs.5,000,000/= according to the valuation report exhibited as ENB 3 on the replying affidavit by the 2nd and 3rd defendants to be disposed off for Kshs.884, 740.20.

The plaintiff submits that the applicant was a guarantor to one Amos Tenai, the 1st defendant for a loan of Kshs.800,000/=. The 1st defendant was paid a total of Kshs.1,001,375/= leaving a balance of Kshs.282,424/= as at 6.7.2015 and yet the 3rd defendant demanded an astronomical figure of Kshs.888,788.20. This is manifestly wrong and justifies an injunction as required by law. He further submits that the property is matrimonial property and if the sale is allowed, the applicant will suffer irreparable loss that cannot be compensated by damages as the entire family will be rendered homeless. She is ready to redeem the property if the 2nd defendant gives the right figure.

The 2nd and 3rd respondents submits that the application is an abuse of the process of court as the

applicant has not met the threshold for grant of orders sought. This court has time and again held that such application for injunction should be determined on the principles set out in ***Giella Vs Cassman Brown. & Co Ltd [1973] EA 358.*** The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

It is not in dispute that the 2nd defendant advanced to the 1st defendant Kshs.800,000/= secured by a charge in favour of 2nd defendant securing Kshs.800,000/= over property title No. Pioneer/Ngeria Block EATEC/3580 registered in the name of the plaintiff and that loan was disbursed on 1st February 2013 to loan account No. 0300290850157. The plaintiff now claims that the 1st defendant paid the loan with a balance of Kshs.282,424.47 only but the 2nd defendant now fraudulently intends to sell the property which will leave the plaintiff and family homeless. The 2nd defendant on his part, argues that the plaintiff is in default in the payment of the loan and submits that he complied with the law and issued a statutory notice which the plaintiff does not dispute. The plaintiff acknowledge that there is a debt.

Moreover, the 2nd defendant argues that the plaintiff has not demonstrated that he will suffer irreparable loss that cannot be adequately compensated by damages. The 2nd defendant further submits that once such a property is given as security by the chargor, it becomes a commodity and is subject to sale. The value of the property is ascertainable and any loss suffered can be revealed.

On balance of convenience, the 2nd defendant argues that the same tilts towards in their favour and that the application should be disallowed so that the bank realises its security. The 2nd defendant further argues that the plaintiff is guilty of non-disclosure as she has concealed that the 1st defendant is indebted to the 2nd defendant.

The Interested Party on his part argues that the plaintiff should not be punished for a defective application as the mistake was occasioned by counsel and that the court ought to administer substantive justice. The Interested Party argues further that the principles for grant of temporary orders of injunction have been satisfied. According to the Interested Party, the plaintiff and 1st defendant are guilty of material non-disclosure. Moreover, that the spousal consent does not disclose that the property is matrimonial home.

I have considered the application, supporting affidavits, replying affidavits and the interested party's affidavit and do find that by letter of offer dated 27.12.2012, the 2nd defendant advanced the 1st defendant Kshs.800,000/= secured by a charge in favour of the 2nd defendant securing the Kshs.800,000/= on property No. Pioneer/Ngeria Block EATEC/3580 registered in the name of the plaintiff. The loan was disbursed on 1.2.2013, the loan account No. 0300290850157. The plaintiff has admitted that the 1st defendant is in arrears though not in terms of Kshs.884,780.20 as claimed by the defendant but she acknowledges that the 1st defendant is owing Kshs.282,420.47. The plaintiff does not deny having received the statutory notice and the redemption notice.

I do find that the 2nd defendant has demonstrated that he followed the right procedure in realization of the security herein and that indeed, the 1st defendant is owing the plaintiff as at the time she came to court. It is not the duty of the court to calculate what is owed but to ensure that the right procedure is followed.

In Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR, the court of appeal found that the principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled in *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof. According to the judges of the court of appeal a *prima facie* case is a case in 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.

I do find that the plaintiff has not demonstrated that she has a *prima facie* case with a probability of success as she admits that the 2nd defendant is being owed some money and that there is no demonstration by the said plaintiff that she never received notice. On the other hand the 2nd defendant

has demonstrated that the three months demand was made pursuant to section 90 of the Land Act and that the plaintiff was issued with the pre-requisite statutory notice as evidenced in paragraphs 8(e) as ***EBN2.*** The certificate of posting, copy of the advertisement and correspondence between the parties were annexed in the replying affidavit of Edwin Ndiwa Bowen which indicate that the plaintiff was properly notified of the sale.

On the issue of irreparable loss, the 2nd defendant has demonstrated that the plaintiff can be compensated in form of damages. The argument that the property in dispute is matrimonial is defeated by the fact that there is spousal consent and therefore the two spouses were aware that the property was charged and therefore a commodity for sale.

On the balance of convenience, it tilts towards not allowing the application as the debt is likely to outstrip the value of the property. Moreover the financial facility benefited the family that now claims that it is likely to be evicted.

There is no privity of contract between the interested party and the 2nd defendant and therefore his claim can only be directed against the plaintiff and 1st defendant and not the 2nd and 3rd defendant.

On the issue of material non-disclosure, this court finds that the plaintiff has failed to disclose that she is a spouse to the 1st defendant who never filed any pleading or affidavit. Failure to disclose that the 1st defendant was the plaintiff's spouse caused injustice as the court could not have granted interim orders if it had come to its knowledge that the 1st defendant was the spouse of the plaintiff. It is trite principle of equity that he who comes to equity should come with clean hands. The plaintiff's hands are not clean due to non-disclosure. upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE