



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 14 OF 2015

DAVID KOMEN SIRIMU.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT

PROTUS WANGA T/A TIMELESS AUCTION SERVICES.....2ND DEFENDANT

RULING

David Komen Sirimu hereinafter referred to as the plaintiff has come to court by way of Notice of Motion dated 20.1.2015 for a temporary injunction restraining the defendants/respondents jointly and severally either by themselves or their agents from offering for sale, transferring, alienating or otherwise in any manner interfering with land parcel Number Eldoret Municipality Block 12/194 and Eldoret Municipality Block 12/195 pending the hearing and determination of this suit. The application is based on grounds that the plaintiff is the registered owner of all that parcels of land known as Eldoret Municipality Block 12/194 and Eldoret Municipality Block 12/195, the suit properties herein. The suit properties are charged to the 2nd defendant in order to guarantee the sum of Kshs.18,000,000/= advanced to M/s Lomsons Enterprises Limited and that the plaintiff properties are in danger of being sold by public auction by the 1st defendant on 21st December, 2012 to recover the sum of Kshs.66,673,424/= yet the sum guaranteed is the sum of Kshs.18,000,000/=. The 2nd defendant has materially altered the terms of the guarantee thus rendering the same void/illegal and that the plaintiff has never been served with any statutory notices or any notification of sale. The plaintiff has a prima facie case with probability of success. The plaintiff stands to suffer irreparable loss in the event that the suit property is sold.

The application is supported by the affidavit of David Komen Sirimu who states that he is the registered owner of all those parcels of land known as Eldoret Municipality Block 12/194 and Eldoret Municipality Block 12/195 and that in or about the month of March, 2007, he charged the suit parcel of land in favour of the 2nd defendant in order to guarantee the amount of Kshs.18,000,000/= advanced to M/s Lomsons Enterprises Limited. The 2nd defendant has never advised him of the default by the said M/s Lomsons Enterprises Limited in the repayments of the sum advanced to it. He was utterly shocked when he saw an advertisement in the Daily Nation on Monday 12th January 2015 to the effects that his parcel of land had been scheduled for sale by way of public auction.

On the same day, he rushed to the 2nd defendant's branch at Eldoret, wherein the branch Manager served him with a letter from the 1st defendant purportedly referenced as a notification of sale informing him that if he does redeem the suit property within forty five (45) days from the date of service of the said letter, then his property is to be sold by way of public auction. That he has also managed to obtain a copy of the bank statement and that from the statement and the notification furnished, it is clear that the 2nd defendant is seeking to recover the sum of Kshs.66,673,424/= despite the fact that the charge instrument was executed to secure the sum of Kshs.18,000,000/=. He has also discovered that the defendant is

illegally seeking to recover the same amount from several other guarantors and thus unjustly enriching itself. It is his contention that he has never been personally served with any statutory notices. He is advised by his present advocate on record, Mr. Tororei which advice he verily believe to be sound that failure to serve a statutory notice and a notification of sale as required by the law renders any intended sale illegal, unlawful, null and void and that the intended sale of the suit property by the 1st defendant without proper service of the requisite statutory notices and notification of sale is illegal, unlawful, null and void. The reserve value indicated in the notification of sale is Kshs.24,000,000/= which amount is a gross undervalue since the parcel of land and the developments thereon are currently valued at a conservative figure of over 50 million. The application before court meets the threshold precedent before the grant of the equitable sought for the following reasons:

(a) That he has a prima facie case with high chances of success.

(b) The defendant is seeking to recover sum of money that is contrary to Section 44 of the Banking Act.

(c) The 2nd defendant is illegally seeking to recover the same amount from several other guarantors and thus unjustly enriching itself.

(d) No notice under Section 90 of the Land Act 2012, has issued to the plaintiff as required by law.

(e) The loss that shall be suffered in the event of is irreparable.

(f) The defendant intended sale has been done without following the due process as set out by the Constitution of Kenya 2010 as well as statute.

(g) No prejudice shall be suffered by the defendant in the event that the orders sought are granted.

(h) It is in the interest of justice that the orders sought are granted to preserve the evidence and the subject matter of the suit.

The defendant filed a replying affidavit sworn by Jackson Kiptala Talibong' stating that the plaintiff charged his property to the tune of Kshs.18,000,000/= together with other sureties to secure the debt of Kshs.76,023,660/= which was advanced to Lomsons Enterprises Ltd and that the principal debtor Lomsons Enterprises Ltd defaulted in repaying the loan and the 2nd defendant issued a demand letter to the plaintiff as the guarantor notifying him of his default by registered post. The plaintiff ignored the demand notice and the 2nd defendant duly issued a statutory notice on the entire outstanding amount of Kshs.72,228,217/= clearly indicating the arrears of Kshs.6,792,474.90. The plaintiff ignored the statutory notice and at the lapse of 90 days, the 2nd defendant instructed the 1st defendant to realize the property and the 1st defendant duly issued the 45 days redemption notice which was personally received by the plaintiff on the 14.06.2014.

The scheduled sale for the 21.08.2014 never took place and the 1st defendant issued a fresh notification of Sale Notice under the Auctioneers Act as well as Section 96(2) of the Land Act by registered post to the plaintiff's last known address. The plaintiff admits then the sum of Kshs.18,000,000/= then the said sum should either be tendered in court or paid into the principal debtor's account. The 2nd defendant has no intention of unjustly enriching itself as it has no claim beyond the loaned sums together with interest as shown in the bank statements. That prior to the proposed sale, the 2nd defendant valued the plaintiff's land and it is common ground that the estimated market value is Kshs.50,000,000/=. That he is informed by the 2nd defendant's advocate that a dispute in figures does not entitle the plaintiff to an injunction, but should the plaintiff pay the sum of Kshs.18,000,000/= together with interest and other bank charges, he will be entitled to an injunction. That it will be inequitable for the 2nd defendant to be stopped from realizing the plaintiff's security yet this is an admission of the principal debtor's indebtedness and no payment in honour of the charge by the plaintiff.

The plaintiff submits that he has demonstrated that it has a *prima facie* case with a probability of success because the defendant is claiming Kshs.66,673,424.20 owed by Lomsons Enterprises Ltd and yet the amount secured by the guarantee was Kshs.22,500,000 while the secured charge is Kshs.18,000,000. The defendant is now seeking to recover Kshs.72,220,000 which is far too more than the secured sum. The plaintiff further submits that the suit property was charged purely for Kshs.18,000,000 together with interest therein, however, the statutory notice demands the applicant's Kshs.72,228,217.60. According to the statutory notices issued and served upon the applicant is invalid and therefore defective pursuant to the mandatory provision of section 90 of the Land Act. He further argues that he shall suffer irreparable loss and damages because the property is matrimonial. The suit property is the source of income and livelihood and stands to be deprived of income and livelihood. On balance of convenience, according to the plaintiff, it tilts towards granting the injunction as the property is valued at Kshs.50,000,000/= which is sufficient to meet the applicant's indebtedness. The applicants are sufficiently secured.

The defendants on the other hand submits that though it is true that the value charged was Kshs.18,000,000/=, it should be appreciated that the plaintiff was not the only guarantor as the plaintiff was a group of individuals who guaranteed the entire debt of Kshs.72,223,217.60. On the issue raised by the applicants that the amount lent to Lomson Ltd was more than the amount secured and therefore the charge is invalid. The respondents argue that the plaintiff was not the only guarantor of the amount loaned as there were other individuals. On the issue of service, the defendant submits that notice was sent to the last known address and that the auction notices were properly sent to the plaintiff. On the issue of irreparable harm, the defendant submits that the potential loss by the plaintiff can well be taken care of by the defendant. There is no evidence of such incapability. On balance of convenience, the defendant argues that the balance of equity shall be in his favour as the plaintiff has admitted only Kshs.18,000,000/= and yet has not paid the same under the benefit from the injunction.

I have considered the application for injunction and the supporting affidavit, the replying affidavit and the rival submissions and do find that the first issue to be considered is whether the notice required under section 90 of the Land Act was not complied with. The charge document is very clear that the plaintiff's address is P. O. Box Number 5093-30100, Eldoret. The affidavit sworn on 8.8.2012 by David Komen also indicates the aforesaid address as the plaintiff's address. His wife Cecilia Kirui also confirms the said address. The spousal consent confirms the same though the guarantee shows his address as 6748-30100, Eldoret. There is no letter indicating that there was change of address. I have seen the demand and statutory notice and the certificate of postage and do find the same were addressed to the postal address supplied by the plaintiff. I do find that the plaintiff was duly served with the demand and statutory notice. For the 45 days redemption notice pursuant to Rule 15(d) of the Auctioneers Rules 1997 and the notification of sale, I do find that the same are signed by the Chargor (owner of property) however, there is no affidavit of service. It was incumbent upon the defendant to prove by affidavit that the two documents were served after denial by the plaintiff. I do find that it has not been demonstrated that the 45 days redemption notice and notification of sale were served. However, this court finds that the statutory notice was defective as it intended to recover Kshs.66,673,424/=.

The principles for granting injunction were set out in the celebrated case of Giella vs Cassman Brown thus, for this court to grant a preliminary injunction which is not as a matter of right, the applicant ought to demonstrate a likelihood of Success on the Merits, a plaintiff must first prove that he is likely to succeed on the merits. Courts have recast the likely "to succeed" factor in a variety of ways, including requiring a plaintiff to demonstrate that there is a "reasonable certainty" or "strong probability" that he will prevail on the merits or that there is a "reasonable probability of success." While courts differ on their exact formulations of what is required to "succeed on the merits," they agree that a plaintiff must at least present a prima facie case to satisfy this factor. The second factor that a plaintiff must establish is that he is likely to suffer irreparable harm in the absence of an injunction. "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant and that a "mere possibility" of irreparable harm is insufficient to warrant a preliminary injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with the characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. The court must also balance the equities of the case. This

involves balancing the harm to the defendant if an injunction is granted with the harm to plaintiff if an injunction is denied.

I do find that the plaintiff has established a *prima facie* case with a possibility of success as the 45 days redemption notice has not been proved to have been served and that the amount indicated in the statutory notice is misleading. On the issue of irreparable harm, the plaintiff has not demonstrated that the defendant will be unable to pay damages if he succeeds in the suit. On a balance of convenience, it holds that the plaintiff should be protected from unfair procedure as he is likely to lose a prime property.

The upshot of the above is that this court grants a temporary order of injunction restraining the defendants/respondents jointly and severally either by themselves or their agents from offering for sale, transferring, alienating or otherwise in any manner interfering with land parcel Number Eldoret Municipality Block 12/194 and Eldoret Municipality Block 12/195 pending the hearing and determination of this suit. The defendant is at liberty to restart the process by issuing the relevant notices as it has not been demonstrated by the plaintiff that he has paid the sum guaranteed. Orders accordingly. Costs in the cause.

DATED AND DELIVERED AT ELDORET ON 4TH DAY OF NOVEMBER, 2016.

ANTONY OMBWAYO

JUDGE