



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L. CASE NO. 76 OF 2016

SANUEL KIPROP PLAINTIFF

VERSUS

OBADIAH KIPLETING KOGEI 1ST DEFENDANT

SAMWEL NDIRITU KARIUKI 2ND DEFENDANT

FAMILY BANK LIMITED 3RD DEFENDANT

MARGARET ANINDO T/A IGARE AUCTIONEERS..... 4TH DEFENDANT

R U L I N G

The plaintiff Samuel Kiprop has brought the suit against Obadia Kipleting Kogei and S. N. K. Family Bank Limited and Margaret Anindo T/A Igare Auctioneers claiming that at all material times to this suit the plaintiff is the registered proprietor of all that land parcel known as Turbo East Leseru Block 6 (Kamagut) 138 measuring approximately 13.77 Ha herein referred as the suit land. The plaintiff states that the 1st defendant approached him in December, 2014 to guarantee him a loan facility of Kshs.1,200,000/= (Kenya Shillings One Million Two Hundred Thousand) which facility was granted to him by 3rd defendant vide its Eldoret West Branch with his land parcel; title no. TURBO EAST/LESERU BLOCK 6(KAMAGUT) 138 as security. The plaintiff avers further that he was made to believe that the above bank facility was to be repaid in monthly installments and the completion period was within two years and that he had learnt with utter surprise that the 3rd defendant has secretly commenced the process of realization of the security by instructing the 4th defendant to sale /auction the suit property on account of the loan arrears without giving notices as required. The plaintiff agrees to have sold part of the land to third parties and that the entire transaction is a nullity. Ultimately the plaintiff prays for judgment against the defendants for:

a. A declaration that the entire transaction and / or process leading to the registration of a charge against the plaintiff's Title No. TURBO EAST/LESERU BLOCK 6 (KAMAGUT) 138 was and / or is null and void abinitio.

b. A permanent injunction restraining the defendants, their servants, trustees and/or agents from trespassing onto. Entering, offering for sale/auction, transferring or in any other way from interfering or dealing with the plaintiff's suit property.

c. Release of Title No. TURBO EAST/LESERU BLOCK 6(KAMAGUT)/138 and discharge of charge to the plaintiff unconditionally.

d. Costs of this suit and interest.

The suit is accompanied with an application for injunction restraining the defendants, their agents, and servants, trustees from trespassing onto, entering, constructing, leasing, offering for sale and/or auction, transferring or in any other way from interfering with land parcels known as TURBO EAST/LESERU BLOCK 6(KAMAGUT)/138 pending hearing and determination of the substantive suit. The application is based on grounds that the plaintiff is the sole registered proprietor of all that parcel of land known as TURBO EAST/LESERU BLOCK 6(KAMAGUT)/138.

The plaintiff purportedly guaranteed the 2nd defendant a bank facility whereas he was made to understand that he was guaranteeing the 1st defendant and offered his title No. TURBO EAST.LESERU BLOCK 6 (KAMAGUT).138 as security. The plaintiff has learnt with utter surprise that the defendants working in cahoots have secretly commenced the process of realization of the security without giving requisite notices. That the 2nd defendant is actually a stranger to the plaintiff. That the plaintiff's guarantee was limited to the sum of Kshs.1,200,000/= only and which sum was guaranteed to the 1st Defendant and not the 2nd defendant. That the plaintiff's consent was obtained fraudulently and under undue influence. That the suit property is inheritance from ancestral land with several purchases therein. That as such, the plaintiff has filed the instant suit challenging the validity and legality of the charge registered over the suit land and the intended sale. That the suit raises prima facie case with probability of success. That unless the application is allowed, the intended sale of the suit land will take place hence rendering the suit nugatory and thereby exposing the plaintiff to suffer irreparable loss and damage.

In the supporting affidavit, the plaintiff states that he is the owner of the suit property and that in December 2014 he was approached by the 1st Defendant to guarantee him a loan of Kshs,1,200,000/= for the 3rd Defendant using the suit property as security. That he had learnt with utter surprise that the 3rd defendant had secretly commenced the process of realization of the security by instructing the 4th defendant to sale/auction the suit property on account of loan arrears without giving me notices as required. That on 16.3.2016, he instructed his advocates to conduct an official search over the suit property and the same revealed that a charge was registered on 30.3.2016 for the sum of Kshs.4,000,000/= in favour of the 3rd defendant.

That on 21.3.2016, he in company of his wife went to the 3rd defendant's Eldoret West Branch offices and requested for the loan statement from the credits office to ascertain the status and he was surprised to learn from the 3rd defendant's records that he purportedly guaranteed the 2nd defendant who is stranger to him a loan facility of Kshs.4,000,000/= which loan was in arrears. That he confirms that the 1st, 2nd and 3rd defendants fraudulently obtained his consent to charge the suit property. The 1st, 2nd and 3rd defendants misrepresented facts to him to believe that he was guaranteeing a loan of Kshs.1,200/= only. That he confirms that the 1st, 2nd and 3rd defendants misrepresented facts to him to believe that he was guaranteeing the 1st defendant a loan but on the other hand introducing the 2nd defendant. That he confirms that the 1st defendant had deliberately refused and/or ignored to honour and/or repay the loan to fix him and his family and render them landless.

According to the plaintiff the 3rd and 4th defendants have maliciously and/or secretly commenced process of the realization of security by selling the suit land without giving him the necessary notices. That he confirms that by the 3rd and 4th defendants failure to advise him on the loan status and/or non repayment by the 1st and/or 2nd defendants, are acting in bad faith and that the 1st defendant took him to U & I Bar in Eldoret town where he bought him a lot of alcohol and when he was drunk, he took him to the 2nd defendant's Eldoret West Branch to sign the loan and /or charge documents without reading the documents. He therefore believes that he signed the said documents if at all he did under influence of alcohol and he was advised by his counsel on record which advice he verily believes to be true that obtaining signatures from a person under undue influence is illegal and fraudulent and therefore same should not assist a litigant and that he had never been called upon to attend the Land Control Board to obtain consent to charge the suit property and was advised by his counsels on record which advice he

believes to be true that obtaining the consent of the land control board is a mandatory requirement in law before charging the suit property. The suit property has over twenty five (25) purchasers who have been staying there with their families for a period of over ten (10) years. The said purchasers have heavily invested and/or done developments on the suit property and they have no where to go if this property is sold / auctioned.

That he states that he raised the dispute herein with the 1st defendant's father, Gilbert Sawe and other relatives and a meeting was convened on 3.4.2015 where it was agreed that:

a. Mr. Julius Saina (1st Defendant's grandfather) does provide his title deed to replace the plaintiff's security with the 3rd defendant.

b. Mr. Gilbert Sawe (1st defendant's grandfather does pay the arrears of his son's loan by 10.4.2016.

c. The 1st defendant be warned not to apply for any top up in respect of the 3rd defendant's loan herein.

d. The process of replacing the security be one between 1.5.2015 and 1.8.2015 so that the plaintiff's title can be released back from the defendant's custody.

That he was advised by his counsel on record which advice he verily believes to be true that a guarantor has a limit and in his case the plaintiff's guarantee was limited to the sum of Kshs.1,200,000/= only. That he believes that the 4th defendant has under valued the suit property to suit their selfish and / of hidden interests and further states that he acquired the suit property herein as an inheritance from by deceased father being ancestral land with several purchasers therein. That as such he filed the instant suit challenging the validity and legality of the charge registered over the suit land and the intended sale. That he believes that the suit raises prima facie case with probability of success.

That he is apprehensive that unless the application is allowed, the intended sale of the suit land will take place hence rendering the suit nugatory and thereby exposing the plaintiff to suffer irreparable loss and damage.

The 3rd Respondent filed a replying affidavit stating that a Mr. Samuel Nderitu Kariuki (the Defendant) herein was advanced with a facility of Kshs.4,000,000/= at his behest. This loan was secured by a 3rd party charge over title number TURBO EAST/LESERU BLOCK 6 (KAMAGUT)/138 which is registered in the name of the plaintiff. As part of security, the plaintiff executed a deed of guarantee and indemnity as well as the 3rd Party charge. The plaintiff's spouse also signed the spousal consent to charge and surrendered a copy of her ID to the Bank in line with the provisions of the Land Act. As such the plaintiff's assertion that the charge document was signed under the influence of alcohol is a sham and pure imaginations. Further, the plaintiff executed the charge before an Advocate (Mr. Mwangi Wahome) and executed the signature freely and voluntarily. According to the 3rd It is worth noting that consent was obtained from the lands Control Board before charging which begs the question, was he drunk at that time too? That upon registrations of the securities, the 3rd defendant disbursed **Kshs.2,000,000/= on 30th December 2014 and Kshs.2,000,000/=** in 3rd January 2015 making a total of Kshs.4,000,000/= which amount is outstanding at Kshs.4,111,056.95 as at 31st March 2015 and which amount continues to accrue interests.

The 3rd Respondent states further that by offering the property to be used as security to the 3rd Defendant he had converted it into a commodity of sale and /or a commercial property and attached value to it hence he can not suffer irreparable loss and damage and states futher that after the loan had been disbursed the 2nd defendant defaulted in the repayment of the loan prompting the 3rd defendant to commence realization process. Demand notices dated 8th October 2015, 23October 2015, 10th November 2015 and 28th November 2015 were issued to the 2nd Defendant and which did not elicit and positive Response.

That thereafter a three months statutory notice was issued on 9th December 2015 to the plaintiff with separate copies to the 2nd defendant. Subsequently thereto a Notice of intention to sell was issued to the plaintiff on 9th March 2016 with separate copies to the 2nd defendant and the plaintiff's spouse. After the expiry of the period stipulated in the notice of intention to sell, the defendants will issue instructions to its auctioneers to proceed with the sale of the suit land in compliance with the provisions of the law. The Defendant claims to have allowed the plaintiff and the 2nd defendant 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 Honourable Court.

The 3rd respondent further states that the plaintiff is guilty of material non-disclosure as he failed to disclose that the borrower was in arrears and lying that he did not receive statutory notice. The 3rd defendant claims that he may be prejudiced as the debt is likely to outstrip the value of the suit property which continues to accrue with interest hence he is likely to suffer irreparable loss.

Anne Jesang Killi swore a supplementary affidavit stating that she is the plaintiff's wife and that had not signed any spousal consent to charge the suit property and that she has never surrendered a copy of her Identity Card to Family Bank Ltd in line with the provision of the Land Act. She claims that the 2nd defendant is a stranger to her. She further claims that her husband was never served with the demand statutory notice, save the notification of sale of the suit property. She contends that the suit property is matrimonial property with several purchasers and therefore, she stands to suffer irreparable harm with her husband if the property is sold.

The plaintiff filed a further affidavit which he states that he charge document is not signed by himself. He further claims that he never signed the application to the Land Control Board and that the consent appears to have been granted before the application was made. He claims that the 2nd defendant is a stranger to him and that he executed the guarantee knowing that the property belonged to the 1st defendant and that the loan guaranteed was Kshs.1,200,000. He claims not to know the advocate known as Mwangi Wahome. He claims that his postal address is not as indicated in the charge document.

The plaintiff submits that he has established a case with a probability of success. The plaintiff submits that the suit is premised on fraud whose particulars are well stated or demonstrated in the affidavit of support of the application. He claims not to have signed the application for consent of the Land Control Board to charge the suit land. He claims that the signature appearing on the application is not his and therefore, this demonstrates fraud. He claims not to have attended the Land Control Board. Moreover, the plaintiff claims that the application referred to the consent is one dated 11.12.2014 whereas the consent was dated 20.11.2014 and therefore, the consent was given before the application.

It is alleged that the consent of Land Control Board could have been obtained by fraud. The plaintiff further argues that he never executed the charge and therefore, the charge document is a nullity. The plaintiff further argues that he was not notified of the loan arrears and or swerved with statutory notice as by law requirement before the intended sale. Last but not least, he denies existence of spousal consent. On the issue of irreparable loss which cannot be compensated adequately by an amount of damages, the plaintiff argues that he suit property is matrimonial property and that there are many purchasers occupying the land. On balance of convenience, the plaintiff submits that it tilts hands preserving the suit property.

The 3rd and 4th respondents on their part argues that the plaintiff has acknowledged indebtedness to the 3rd defendant and therefore, should not claim for any equitable remedy. The applicant has not written to the bank to release the title document to the above land.

On the issue that the plaintiff suffering irreparable harm that cannot be adequately compensated with damages, the 3rd defendant argues that having agreed to use his property as security, he converted it into a commodity and subject to sale. The value of the property is ascertainable and any loss suffered by the plaintiff resultant in damages.

On balance of convenience, he argues that balance of convenience tilts hands not granting the injunction

to allow the bank release its security. There is a danger that the debt may not stop the value of the suit property.

I have considered the pleadings, the application, supporting affidavit, replying affidavit, further and supplementary affidavits and do find that it is crystal clear that Mr. Samuel Ndiritu Kariuki of Post Office Box No. 5100-00200, Nairobi applied for a banking facility of shs.4,000,000, a secured term loan to be repaid within 48 months. The purpose of the loan was a working capital. The security for the facility was a legal charge for Kshs.4,000,000 over LR No. Turbo East/Leseru Block 6 (Kamagut)/138 in the name of Samuel Kiprop who executed a charge over the said property. The charge was drawn by an Advocate of the High Court of Kenya known as Mwangi Wahome.

The spousal consent was given on 30.12.2014. It is also clear that the borrower has defaulted and that Kshs.4,11,056.95 was owing as at 31.3.2016. the plaintiff has not demonstrated that the amount has been paid.

The consent of the Land Control Board was sought and obtained. Though there are discrepancies in dates, the same does not vitiate the consent that was granted. The plaintiff claims that he did not sign the application for consent and that his wife did not sign the spousal consent, however, no report was made to the police that their signatures were forged.

On service of the statutory demand notice, I am satisfied that the plaintiff was served as demonstrated by the 3rd respondent in Exhibit AO2 annexed in the affidavit of Antony Ouma sworn on 5.5.2016 at Eldoret. I do not believe the application statement that he guaranteed the 1st defendant in terms of a loan of Kshs.1,200,000 as he has not produced the same.

The allegation by the plaintiff that he was taken to the U91 Bar in Eldoret where he took a lot of alcohol and when drunk, was taken to the 3rd defendants West bank to sign the charge document and signed the document under influence of alcohol are not substantiated. The question that begs an answer, is why did he wait for that long time for the 3rd respondent to commence the process of recovering the case to court.

This court finds that for the above reasons, the plaintiff has not established a prima facie case with a probability of success.

On the issue of irreparable harm that cannot be adequately compensated in damages, I do find that the moment the plaintiff agreed the charge their property, it became a commodity liable for sale. The value of the property is ascertainable and if the plaintiff succeeds, he can be paid charges on the value of the property.

On the balance of convenience, it tilts towards not granting the injunction as it is likely to hurt the 3rd defendant as the debt will outstrip the value of the charged property.

On material non-disclosure, I do find the plaintiff is less candid by denying the existence of the charge and guarantee and yet the available documents show otherwise. The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET ON 2ND DAY OF DECEMBER, 2016.

ANTONY OMBWAYO

JUDGE