



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 33 OF 2013

JAMES NG'ANG'A NJOROGE.....PLAINTIFF

VS

K REP BANK LTD.....DEFENDANT

(Application for injunction; plaintiff seeking to have Bank stopped from auctioning his property; basis of plaintiff's case being that no charge was ever registered on the suit land; respondent demonstrating that charge was duly registered; no prima facie case established by plaintiff; application dismissed with costs)

RULING

In this application, the plaintiff seeks an order of injunction to stop the defendant from offering for sale or transferring the land parcel Olare/Burnt Forest Block 5 (Ngarua)/ 82 pending the hearing and determination of this suit. The grounds upon which the application is founded are inter alia that the defendant has instructed Orekem Blus Services, a firm of auctioneers to sell the suit land. It has been stated that the applicant is guarantor to one Margaret Waithira Ng'ari, the principal debtor but that the suit land was not charged to secure the loan. It is contended that the bank cannot therefore purport to sell or realize the suit land.

The application is supported by the affidavit of the plaintiff who has inter alia stated that he is the registered owner of the suit land. He has also deponed that he received a call on 11th December 2012 from the auctioneers informing him that they had instructions to sell the land to recover monies owed by the principal debtor. He then opted to visit the respondent's branch at Eldoret. At the branch he was informed that the auctioneers had been instructed to sell the suit land. He has deponed that the suit land has never been charged hence cannot be sold and has asked this court to arrest the illegality.

In the plaint, the applicant has inter alia averred that sometimes in September/October 2011, the plaintiff used the title to the suit land "as chattel to guarantee one Margaret Waithera Ng'ari secure finance from the defendant's Eldoret Branch." He has pleaded that the Bank has instructed Orekem Blus Services to sell his land, which process he has pleaded is tainted with illegality. Among the particulars of illegality is that the suit land has not been charged and therefore the Bank cannot purport to exercise its statutory power of sale. The main prayer in the plaint is for orders of permanent injunction restraining the defendant from selling the suit land and a declaration that the contract of guarantee between the plaintiff and defendant is illegal hence void *ab initio*.

The defendant responded through the replying affidavit of Anthony Mwangi, the branch manager of the defendant bank. He has deponed that the Bank advanced to Margaret Waithera Ng'ari an amount of Kshs. 1 million. He has stated that the loan was advanced against a legal charge created over the suit land. He has deponed that the plaintiff executed a valid charge dated 16th November 2011 and that the plaintiff also executed a deed of guarantee and indemnity on the same date. He has averred that the charge was registered on 18th November 2011. He has deponed that the borrower has defaulted and that the Bank therefore intends to realize the security. He has deponed that the Bank is bound to follow the laid down process before the sale. He has stated that a statutory notice was sent on 25th January 2013 and no sale can take place before the notice expires. In his view, this suit is premature. To his affidavit, he has inter alia annexed a copy of the charge and title, showing the charge duly registered, and copies of the contract of guarantee executed by the plaintiff.

I have considered the pleadings, the affidavits in support and in opposition and the submissions of Mr. Mbeja and Mr. Mwetich, counsels for applicant and respondent respectively.

The case of the plaintiff is that he only deposited his title to the Bank but that no charge was ever registered. It is therefore his position that there being no charge, the Bank cannot proceed to dispose of the suit land. This of course cannot be the position as I have seen the duly registered charge which has been annexed to the replying affidavit. Mr. Mwangi has deponed that there has been default, a fact not denied by the applicant, and that they have commenced the process of realizing their security. I see no problem with the Bank commencing the process of selling of the suit land because they are perfectly entitled to do so if there has been default. I have also not seen any problem with the contract of guarantee that the plaintiff executed.

A party wishing to benefit from an order of injunction must inter alia demonstrate a prima facie case with a probability of success (See *Giella v Cassman Brown (1973) EA 358*). As stated earlier, the whole of the case of the plaintiff is premised upon the argument that no charge was ever registered and that the contract of guarantee is illegal. We have already seen that there is a valid charge which has been duly registered. I have also not seen any problem with the contract of guarantee. Indeed, it is certainly the practice, and also prudent, to have the land owner execute a contract of guarantee where he offers his land as security for a loan to be advanced to another person. There is nothing wrong and nothing illegal with that. The whole of the plaintiff's case is premised on the wrong presumption that no charge was ever registered on the suit land. Since this is not the true position of the matter, the whole of the plaintiff's case has lost its substratum, and in my preliminary assessment, I am not of the view that the plaintiff has demonstrated a case with any probability of success.

It is not necessary for me to say more. It is obvious that the plaintiff is undeserving of the injunction sought. His application is hereby dismissed with costs and all interim orders earlier given are hereby discharged.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF FEBRUARY 2014

JUSTICE SILA MUNYAO

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. W. Kigamwa holding brief for Mr. Mukira for Plaintiff/applicant.

Miss J.C. Tarus holding brief for Mr. Mwetich for defendant/respondent