



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
LAND CASE NO. 152 OF 2013

KESREC AGENCY LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

VALLEY AUCTIONEERS.....DEFENDANTS/RESPONDENTS

ECO BANK LIMITED.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction

1. What is before me is the Plaintiff's Application dated 28th August, 2013 seeking for the following orders;

(a) That this Honourable Court be inclined to issue an injunction directed against the 1st and 2nd Respondents or either of them, their servants, assigns and or agents, restraining them from offering for sale by way of public auction scheduled for the 29th day of August 2013 or otherwise selling, transferring, alienating or causing any adverse interference with the plaintiff's landed property otherwise known as LR No. 13424 & 13430 KAOYENI MALINDI MUNICIPALITY cumulatively measuring 2 acres or 0.4HA including disrupting the day to day operations of the plaintiff's academic institution christened ROYAL FOUNTAIN HIGH SCHOOL pending the hearing and determination of this suit or further orders of this Honourable court.

(b) That the costs of this application be provided for.

2. The Application is premised on the grounds that although the Applicant took up a loan with the 2nd Defendant in the sum of Kshs.5,000,000 for the development of its academic institution and surrendered a collateral with it, the Plaintiff's director explained to the 2nd Defendant its financial position and promised to offset the loan once it admitted a sizeable number of students at its institution known as Royal Fountain High School; that the 2nd Defendant has since reneged on the agreement and has caused a notice of sale to issue by public auction through the 1st Defendant.
3. The 2nd Defendant filed a Notice of Preliminary objection together with the Replying Affidavit. In the Preliminary Objection, the 2nd Defendant averred that the Supporting Affidavit by one Jane

- Wahiga Wanjohi sworn on 28th August 2013 should be expunged from the court record because the jurat appears on its own page.
4. In the Replying Affidavit, the 2nd Defendant's legal officer deponed that vide letters dated 22nd February, 2012 and 6th September 2012, the 2nd Respondent intimated to the Applicant that its accounts were in arrears; that on 6th September 2012, the 1st Respondent also issued to the Plaintiff a statutory notice expressing its intention to exercise its statutory power of sell and that upon the expiry of the said notice, the 2nd Respondent instructed the 1st Respondent to issue a proclamation notice upon Applicant and thereafter sell the mortgage property.
 5. The 2nd Defendant's legal officer finally deponed that the Plaintiff is truly and justly indebted to the 2nd Defendant and the Application is an attempt by the Applicant to circumvent justice and deny the 2nd Respondent its right to sell the mortgage property and recover its monies.
 6. The parties' advocates filed their respective submissions. The Plaintiff's advocate submitted that it is the discretion of the court to grant a temporary order of injunction and that this court is enjoined to consider what has become known as the principle of proportionality under the overriding objective.
 7. According to the Plaintiff's advocate, the court should always opt for the lower rather than the higher risk of injustice and that the Applicant will suffer irreparably if the injunctive order is not granted.
 8. On his part, the 2nd Defendant's advocate submitted that the superior courts have pronounced time and again that in an affidavit, the jurat must not appear on its own page. Counsel relied on the case of **Saki Holdings Ltd-vs-Diamond Trust Bank of Kenya, HCCC No.1098 of 1998** to buttress his argument.
 9. On the issue as to whether an injunctive order should issue or not, the 2nd Defendant's counsel has submitted that the 2nd Defendant followed the due process and that the sale of the suit property by way of public auction is for all intents and purposes valid.

Analysis and findings;-

10. The 2nd Defendant has asked this court to strike out the Plaintiff's affidavit because the jurat appears on a different page.
11. There is no evidence by the Defendants that by the jurat appearing on a different page, the 2nd Defendant has been prejudiced in anyway. Indeed, the 2nd Defendant has responded to the depositions made by the Plaintiff in his supporting affidavit.
12. Under the new constitutional dispensation, and in light of Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act, the courts have taken the approach of not striking out pleadings for want of form without first examining whether the striking out of a pleading will be in conformity with the overriding objective set out in the Civil Procedure Rules and the Constitution.
13. This is the position that the Court of Appeal took in the case of **NICHOLAS KINTO ARAP KORIR SALAT VS I.E.B.C & OTHERS(2013)Eklr**, in which it stated as follows:

“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

14. Earlier on, Justice Ringera in **Welcome Properties Vs Karuga (2001) KLR 402** in his usually

clarity held as follows:

“I am in agreement with the main thrust of Mr. K’Owade’s submissions that a procedural defect does not oust the jurisdiction of the court and that unless injustice or prejudice is shown defects of form and other procedural lapses cannot vitiate the proceedings. In the instant case, the Respondents do not complain of any prejudice or injustice.”

15. In the circumstances, I disallow the 2nd Defendant's Preliminary Objection.
16. The Plaintiff has not denied that he owes the 2nd Defendant money that it borrowed. The Plaintiff has also not denied that it fell in arrears and the 2nd Defendant lawfully issued to it the statutory notice as required by law.
17. I have perused the Supporting Affidavit and I do not understand why the Plaintiff wants this court to protect the charged land in view of the admission for non-payment of the accrued loan amount. In the case of **Mrao Limited-vs-First American Bank of Kenya Ltd & 20 Others(2003) KLR 127**, the Court of Appeal, while dismissing the Appellant’s application for injunction quoted the **Halbury’s Laws of England Vol.32(4th edition) paragraph 725** as follows:-

“The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagee has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is the amounts which the mortgagee claims to be due to him, unless on the terms of the mortgage, the claim is excessive”

18. The Plaintiff having admitted that as at the time the statutory notice was issued it was in arrears, the order of injunction restraining the 2nd Defendant from exercising its statutory power of injunction cannot issue. In the circumstances, I find that the Plaintiff has not established a prima facie case with chances of success.
19. I therefore dismiss the Application dated 28th August, 2013 with costs.

Dated and delivered in Malindi this 16th Day of May, 2014.

O. A. Angote

Judge