



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 431 OF 2013

JACOB KIPSUM ARAP NGENY.....PLAINTIFF

VS

FINA BANK LIMITED1ST DEFENDANT

JOHN KIPRUGUT KURGAT

T/A JOPHIK ENTERPRISES.....2ND DEFENDANT

(Application for injunction and for summary judgment; plaintiff having guaranteed a loan granted by the 1st defendant to 2nd defendant; 2nd defendant defaulting; plaintiff asserting that the properties of 2nd defendant need first to be seized before he can be called upon to pay the debt under the guarantee; whether in the circumstances injunction should issue and summary judgment entered; guarantee instrument not providing for seizure of 2nd defendant's property; prima facie plaintiff bound by the terms of guarantee; injunction cannot therefore issue; jurisdiction of the ELC; jurisdiction in cross-cutting matters; situations in which claim can or cannot be severed; application dismissed)

RULING

1. The application before me is that dated 5 September 2013 filed by the plaintiff. It is an application seeking the following orders :-

1. spent...

2. That a temporary order of injunction be and is hereby issued restraining the 1st defendant either by itself, acting by themselves, servants and or agents from offering for sale, taking possession, leasing and or in any other manner whatsoever dealing with the plaintiff's land known as Tulwet/Tulwet Block 7 (Terige)/57, pending the hearing and determination of this application inter partes and thereafter the suit.

3. That an order of preservation of the under mentioned 2nd defendant's properties pending the hearing and determination of this application and suit viz :-

(a) Motor vehicle Reg. No. KBG 810L Toyota Station Wagon valued at Kshs. 500,000/=.

(b) Title deed No. Nandi/Kilibwoni/605 measuring 7.2 Ha charged to Trans-National Bank Ltd -Eldoret Branch.

(c) Eldoret Municipal Council/ Block 21 (Kingongo)/3994.

(d) Premises on building erected on Eldoret Municipal Council/ Block 7/199 comprised in lease agreement dated 1st November 2010.

(e) The goods in stock in premises as in (d) above.

4. That this Honorable Court do grant an order of summary judgment, attachment and sale against the 2nd defendant properties comprises in :-

(a) Motor vehicle Reg. No. KBG 810L Toyota Station Wagon valued at Kshs. 500,000/=.

(b) Title deed No. Nandi/Kilibwoni/605 measuring 7.2 Ha charged to Trans-National Bank Ltd -Eldoret Branch.

(c) Eldoret Municipal Council/ Block 21 (Kingongo)/3994.

(d) Premises on building erected on Eldoret Municipal Council/ Block 7/199 comprised in lease agreement dated 1st November 2010.

(e) The goods in stock in premises as in (d) above.

5. That the 1st defendant upon repayment and satisfaction of its claimed amount do hereby discharge the plaintiff from any other liability whatsoever touching on the plaintiff title No. Tulwet/ Tulwet Block 7 (Terigi)/ 57.

The application is based on the following grounds :-

(a) That the 2nd defendant has refused to service the 1st defendant facility.

(b) That the 2nd defendant has properties to wit that can be sold and be able to offset the said facility.

(c) That the 2nd defendant is being recalcitrant in repaying the said loan.

(d) That the plaintiff's matrimonial property is in danger of being sold.

(e) That before the plaintiff's land is sold, the 2nd defendant properties be sold and the balance be paid by the plaintiff if need be.

(f) That the plaintiff will suffer irreparably if this court will not intervene and the said damages may not be compensated by monetary claim as a matrimonial home will have been sold.

The application is supported by the affidavit of the plaintiff and is opposed by the defendants.

2. The case of the plaintiff as discernible in the plaint and in the supporting affidavit is as follows. The 2nd defendant needed some financial accommodation from Fina Bank Ltd, the 1st defendant. The plaintiff agreed to stand as guarantor in the sum of Kshs. 5 Million and he offered the property Tulwet/Tulwet Block 7 (Terige)/57 as security. The charge was registered on 5 February 2010. The 2nd defendant was unable to service the loan and the Bank instructed a firm of auctioneers to sell the charged property. The plaintiff contends that the 2nd defendant has various properties, which are those that he has listed in his application, and that the same should be seized and sold to offset the loan, and if there is a shortfall, the plaintiff is ready to meet the same.

3. The 2nd defendant has opposed the grant of prayers 3 and 4 of the motion. It is his view that under the law of guarantee, the guarantor has no right of action against the principal debtor before he settles the amount of money that he bound himself to pay under the guarantee. It is also stated that the court cannot

make the order of seizure as the properties of the 2nd defendant are charged to other entities who are not parties to this suit. The prayer for summary judgment is opposed and it is averred that summary judgment cannot be issued where there is no liquidated claim expressly pleaded in the plaint. It is stated that the stock in trade, is owned by a limited liability company known as Set Company Limited and cannot be attached. It is also stated that this court cannot deal with the business and stock as the same are not issues of land or environment. The 2nd defendant is however not opposed to an injunction being issued in favour of the plaintiff to stop the sale of the plaintiff's property. The 2nd defendant on 17 September 2013 also filed a statement of defence. Inter alia it is pleaded that the action of indemnity by the plaintiff cannot be instituted in the Environment and Land Court as it is purely a commercial claim and not a land matter.

4. The plaintiff filed a supplementary affidavit in which inter alia, he deponed that he has since learnt that the motor-vehicle Reg. No. KBG 810 L was sold. He has also stated that he has discovered that the 2nd defendant has erased the trading name in the premises erected on Eldoret Municipal Council Block 7/199 to read Choronok Wholesalers. He has however asserted his right to summary judgment.

5. The Bank filed a replying affidavit sworn by Zachary Muturi Muchai, its manager-recoveries. It is averred that the plaintiff does not seek any prayer in the plaint as against the Bank and that if the application is allowed, it will have determined the suit summarily. It is also stated that the plaintiff has not alleged any wrong-doing on the part of the bank that would entitle him to stop the bank from selling the charged property. It is stated that the plaintiff does not deny that he charged the property to the bank or that he executed a guarantee. The deponent has stated that the 2nd defendant went into default, that demand letters were issued, that a Statutory Notice was then issued, that an auctioneer was engaged and a Notification of Sale was served. It is stated that the plaintiff has not pointed out a single complaint against the bank and has thus not established a prima facie case with any probability of success.

6. In his submissions, Mr. Chemwok for the plaintiff submitted that a guarantor has a right of indemnity and that it cannot be said that the plaintiff must pay first. He submitted that the 2nd defendant is able to pay, but is refusing to do so, and his property should be seized and sold first. He submitted that an injunction needs to issue as the court examines the case between the plaintiff and the 2nd defendant so that the property is preserved. He further submitted that the plaintiff may suffer irreparable loss.

7. The 1st defendant's counsel in his written submissions submitted that the application is devoid of merit and that the 1st defendant has a right to dispose of the security as there is nothing pleaded that challenges the right of the bank to sell the property. He also submitted that the application essentially seeks final orders. He was also of the view that no prima facie case has been established to warrant the injunction, that there was no proof of irreparable loss, and that the balance of convenience is in favour of the bank. He referred me to various authorities which I have considered.

8. Counsel for the 2nd defendant on his party reiterated that the 2nd defendant does not oppose the prayer for injunction against the bank, but only opposes the entry of summary judgment against him. It was also submitted that under law, the principal debtor cannot be enjoined by the guarantor in the same action with that of the creditor. However, no such law was referred to me. It was also reiterated that the guarantor must pay the amount before having recourse to the principal. Again, no law nor authority on this was given to me. The issue of jurisdiction of this court was also canvassed.

9. I have perused the pleadings herein, the application and the reply, and the submissions of counsel and I take the following view of the matter.

10. To be entitled to an injunction, one needs to establish a prima facie case, and if the court is in doubt, it will consider the balance of convenience. The court ought also to be alive to the tenet that an injunction ought not normally to be granted unless damages are an inadequate remedy.

11. An issue of jurisdiction has arisen, and I think I need to first deal with it. The jurisdiction of this court as donated by Article 162 (2) (b) of the Constitution, is to hear disputes relating to the environment and the use and occupation of, and title to, land. Section 13 of the Environment & Land Court Act, Act No. 19 of 2011 elaborates the jurisdiction provided in the Constitution. It states as follows :-

13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?

(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) The Court shall have supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.

(6) For the purposes of subsection (7)(b), the Court may call for the record of any proceedings before any subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority referred to in subsection (7)(b), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

12. In this suit, the plaintiff has inter alia asked this court to issue an injunction to stop the sale of his property by the bank. This to me is squarely an issue that relates to title to land, for if a sale proceeds,

then the title of the plaintiff will be affected. There is of course a commercial element to the suit which brings about a question as to which is the correct forum to hear the dispute. I appreciate that the challenge of jurisdiction will always be present in cross-cutting cases. But as was held in the case of ***Tasmac Ltd vs Roberto Marci & 2 Others, Malindi ELC Miscellaneous Application No. 5 of 2013 (2013) eKLR***, where the claim cannot be severed, then the matter can be heard in either court that has jurisdiction in one of the matters in issue. But I will revisit the matter of whether or not the claims herein are severable, after I deal substantively with the application before me.

13. What the plaintiff really wants in this application is to stay the sale of his property, and at the same time, that summary judgment be entered in his favour against the 2nd defendant, for the amount that the 2nd defendant owes the bank. The plaintiff has listed various properties which he wants seized and the same to be offset to pay the loan.

14. I think the issue of whether or not the plaintiff can have a right to stop the bank from selling his property has to depend on the contract of guarantee that they entered into. I have carefully read the contract of guarantee. An important clause is clause No. 18 of the guarantee which states as follows :-

18. Resorting to Other Means of Payment

The bank shall be at liberty but not bound to resort for its own benefit to any other means of payment at any time and in any order the Bank deems fit without in consequence thereof diminishing the liability of the Guarantor and the Bank may enforce this Guarantee either for the payment of the ultimate balance after resorting to other means of payment or for the balance due at any time notwithstanding that other means of payment have not been resorted to and, in the latter case, without entitling the Guarantor to the benefit from such other means of payment so long as any money remains due, owing or payable (whether actually or contingently) from or by the Principal to the Bank.

15. In simple language, what the above clause provides is that the Bank is not bound to pursue other means of payment before first enforcing the contract of guarantee, and can enforce the claim directly against the Guarantor. Through the charge, the plaintiff also bound himself to pay the money due once there is default, and bound himself that the charged property could be sold in the event of default. The plaintiff did not refer me to any law or any authority that the bank must either first direct its claims to the principal debtor, before seeking to sell the charged property, or that before enforcing its rights against the plaintiff, the bank must wait until the plaintiff as guarantor, obtains judgment and seizes the principal debtor's property. That has not been demonstrated to me. The plaintiff has therefore failed to demonstrate to me a prima facie case, which entitles him to an injunction to stop the bank from selling the property Tulwet/Tulwet Block 7 (Terige)/57 which he charged to the bank.

16. The other question is whether the plaintiff is entitled to summary judgement against the 2nd defendant. In my view, the plaintiff's claim for indemnity is a separate claim from the claim against the bank. The plaintiff can and is free to file suit for indemnity against the 2nd defendant. It is a claim that is severable from the claim of the plaintiff (if any) against the bank. Since I am of the opinion that that claim is severable from the land claim against the bank, I think the best avenue is for the plaintiff to file a separate suit for indemnity, before the High Court, or other appropriate court with jurisdiction. It is for that reason that I decline to enter summary judgement against the 2nd defendant. Let the plaintiff direct that claim to the appropriate court, for in the circumstances of this case, I am of the view that it is a separate and severable claim from the land issue.

17. Even if I had entered summary judgement, which I have not, I could not have made an order for seizure of the listed properties. First, there is nothing tabled to demonstrate that the listed properties are owned by the 2nd defendant. The motor-vehicle KBG 810 L is tied to a chattel's mortgage. No title nor search has been annexed to demonstrate the 2nd defendant's ownership of the properties Nandi/Kilibwoni/605, Eldoret Municipality Block 21 (Kingongo)/3994, nor the premises Eldoret Municipal Council/Block 7/199. In any case, some are said to be charged to other entities. Neither has it been demonstrated that the goods in stock in the latter premises are goods belonging to the plaintiff.

18. The upshot of the above is that the plaintiff's application must fail. I have not been persuaded that any reason has been given to me to stop the bank from realizing the charged property. The bank is free to sell the said property, if it wishes, so long as the laid down procedures are followed. As to the claim for indemnity against the 2nd defendant, since I am of the view that it is severable, I direct the plaintiff, if he is still minded to do so, to file an appropriate suit in the proper forum.

19. For the above reasons, this application is hereby dismissed with costs. All interim orders are hereby vacated.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. M.K. Chemwok for plaintiff/applicant.

Mr. H.O. Aseso holding brief for M/s Macharia Mwangi & Njeru Advocates.

Mr. S.M. Mathai for 2nd defendant.