



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 251 OF 2014**

**CHEPKONGA CHEBON ..... PLAINTIFF**

**VS**

**CONSOLIDATED BANK COMPANY LIMITED ..... 1ST DEFENDANT**

**PROTUS WANGA**

**T/A TIMELESS DOLPHIN AUCTIONEERS ..... 2ND DEFENDANT**

***(Application for injunction to stop the exercise by the bank of its statutory power of sale; allegation that no statutory notice was sent; that the redemption notice is defective; no response from the Bank; prima facie case established; application allowed)***

**RULING**

The application before me is that dated 1 August 2014 filed by the plaintiff. It is an application for injunction brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure. The plaintiff wants the defendants restrained from offering for sale the land parcel Eldoret Municipality/ Block 10/1747 (the suit land) pending hearing of this suit. Despite being served with the application, the defendants have so far not entered appearance and neither have they responded to the subject application. The only material before me is therefore that provided by the plaintiff and his case is discernible from his pleadings, the supporting affidavit, and the annexures thereto.

In brief, the plaintiff is the registered owner of the suit land. Consolidated Bank Ltd, the 1st defendant, advanced some money to a company called Lomsons Enterprises Ltd and the plaintiff agreed to guarantee the loan to the extent of Kshs. 6,000,000/=. A charge was registered on the suit land for a sum of Kshs. 6 million, on the 13th day of August 2012. It seems as if there was default in paying the loan and the bank instructed M/s Timeless Dolphin Auctioneers, the 2nd defendant, to sell the property. On 10th June 2014, the 2nd defendant drew a 45 days Redemption Notice and a Notification of Sale. The same were served on 12th June 2014.

The plaintiff has faulted the move by the 1st defendant to sell the suit land and has also faulted the Redemption Notice and the Notification of Sale on grounds inter alia, that no valid statutory notice has been issued; that the notification of sale seeks to recover a sum of Kshs. 66,673,424.60/= which amount is not the subject of the charge or guarantee; that the amount sought is more than 11 times the principal, thus flouting the in duplum rule in Section 44A of the Banking Act, CAP 488; that the 1st defendant has unduly indulged the principal debtor; that the 1st defendant has not exhausted its remedies as against the principal debtor, and that the notification of sale is a nullity as it indicates that the encumbrance is in

favour of another bank, Oriental Commercial Bank, to secure a sum of Kshs. 5 million.

The plaintiff has annexed a copy of the search of the title to the suit land and copies of the Notification of Sale and Redemption Notice. Although he has stated in his affidavit that he has annexed a copy of the Guarantee instrument, no such document is annexed.

The application before me is an application for injunction and as stated in the case of **Giella v Cassman Brown (1973) EA 358**, one needs to demonstrate a prima facie case and if in doubt, the court will consider the matter on a balance of convenience. As I stated earlier, the defendants despite being served, have not responded to the suit nor application. I can see from the material presented by the plaintiff that there was indeed a charge of Kshs. 6 Million registered against the suit land on 13 August 2012. I have also seen the Redemption Notice and the Notification of Sale issued by the 2nd defendant. The Notification of Sale has pronounced that the Bank intends to sell the suit land on 21st August 2014. The amount claimed is Kshs. 66,673,424.60/=. I am at a loss as to why the bank is claiming this amount. It could be that the plaintiff's guarantee was limited to Kshs. 6 million, but that the amount offered to the principal debtor was much more, but I have no material to back up my assumption and devoid of an explanation by the defendants, it may be that the plaintiff has a case in stating that his outlay is only limited to Kshs. 6 million, and that he has no knowledge of the claim of Kshs. 66,673,424.60/=.

I have also seen the schedule of the property annexed to the Notification of Sale. It states that the property is encumbered in favour of Oriental Commercial Bank Ltd to secure a sum of Kshs. 5 Million, and that the subject charge is dated 22nd March 2011. Now, of course if the intention was to sell a property encumbered in favour of Oriental Commercial Bank, for Kshs. 5 Million vide a charge of 22 March 2011, then it is arguable that the property the auctioneer intended to sell on 21 August 2014, is not the suit land which was charged to Consolidated Bank on 13 August 2012 to secure the sum of Kshs. 5 Million . There needs to be no doubt that what is being sold is the subject matter of a particular charge, and in our case, there is certainly some doubt as to what the 2nd defendant intended to offer for sale. The benefit of this doubt has to be given to the plaintiff.

The plaintiff has also argued that no statutory notice has been issued. When a chargor makes this statement, then the onus is upon the chargee to demonstrate that indeed, a statutory notice was drawn and served upon the chargor. This position was affirmed in the case of **Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR** where the Court of Appeal stated as follows :-

*It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.*

The bank in this instance, has not made any such demonstration.

From the above, I am of the considered opinion that the plaintiff has tabled material, that prima facie, demonstrate that the intended sale of 21 August 2014 has been vitiated by several factors. I have no reason to disallow the application for injunction, for the plaintiff has demonstrated a prima facie case with a probability of success. If the sale is to proceed, there is no question that the plaintiff stands to suffer irreparable loss. I therefore stop any intended sale premised on the Redemption Notice and Notification of Sale dated 10 June 2014 and served on 12 June 2014. The 1st defendant also ought not to surcharge the plaintiff with any costs associated with the intended sale of 21 August 2014 unless it demonstrates during trial, that the intended sale was proper.

As to the costs of this application, the same shall be costs in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF SEPTEMBER, 2014**

**JUSTICE SILA MUNYAO**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

*Mr. S.M. Mathai for the plaintiff/applicant*

*N/a for defendant/respondent*