



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 812 OF 2012

Formerly HCC 23 OF 2012

ELIAZER KIPRUGUT KOSGEI.....PLAINTIFF

VS

BARCLAYS BANK OF KENYA1ST DEFENDANT

DALALI TRADERS.....2ND DEFENDANT

(Application for injunction; principles upon which the court will determine an application for injunction; case of the plaintiff being inter alia that no consent of the land control board was issued before the 1st defendant proceeded to register a charge over the plaintiff's land; 1st defendant moving to exercise its statutory power of sale; plaintiff seeking an injunction to stop the sale; prima facie case; whether consent of the land control board was issued; prima facie evidence that there was no consent issued; application for injunction allowed with costs)

RULING

A. INTRODUCTION

1. Before me is the Motion dated 14 February 2012 filed by the plaintiff. It is an application brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, CAP 21, Laws of Kenya.
2. The plaintiff seeks orders of injunction restraining the defendant from inter alia offering for sale or in any other manner adversely dealing with the plaintiff's land parcel Moi's Bridge/Sirikwa Block 2 (Ziwa)/51 pending the hearing and determination of this suit. The grounds upon which the application are based are numerous. Inter alia, the plaintiff claims that the suit land is agricultural land; that no consent of the Land Control Board was sought and obtained before the 1st defendant purportedly registered a charge over the land; that no statutory notices have been served upon the plaintiff; that no notification of sale has been served upon the plaintiff and no reserve price has been put in the advertisement notice; that the auction was to be conducted in the private offices of Ms Joyland Auctioneers; that a public auction could not be conducted in a private office; The application is supported by the affidavit of the plaintiff and is opposed by the defendants who have filed replying affidavits.
3. This being an application for injunction, I stand guided by the principles laid out in the case of **Giella v Cassman Brown** (1973) EA 358. In the said case, the court stated that before allowing an application for injunction, the court needs to be satisfied that the applicant has laid out a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted unless damages are an insufficient remedy; and finally if in doubt, decide the matter on a balance of convenience.

The starting point is therefore the plaintiff's case as laid out in his plaint and affidavit in support.

B. THE PLAINTIFF'S CASE

4. The plaintiff has pleaded that he is the registered proprietor of the land parcel Moi's Bridge/Sirikwa Block 2 (Ziwa)/51 which is agricultural land registered under the Registered Land Act (CAP 300) (now repealed). The plaintiff has pleaded that the land being agricultural land is governed by the provisions of the Land Control Act (CAP 302) Laws of Kenya. He has averred that in the month of April 2009, the land was charged to Barclays Bank of Kenya Limited to secure the payment of Kshs. 2 Million which the plaintiff claims to have been repaying. On 13 February 2012, the 2nd defendant, Dalali Auctioneers, on the instructions of the 1st defendant advertised the suit land for sale by public auction scheduled for 16 February 2012. The plaintiff has pleaded that prior to the advertisement he had not received any notices as required under the provisions of the Registered Land Act and the Auctioneers Act. The plaintiff has also pleaded that that the 1st defendant does not hold any valid charge over the suit land. He has pleaded several particulars of fraud, illegality and breach of statute against the defendants, being inter alia, that the no consent of the Land Control Board was ever sought to sanction the transaction; that no statutory notice under the provisions of Section 65 (2) of the Registered Land Act was ever issued; that in the absence of a statutory notice no other valid notice could be issued or action for recovery continued; that no valid notices under the provisions of Section 74 was issued; that no notice was served upon the plaintiff by the auctioneer; that no sale of land by public auction may be convened or conducted in the private offices of an auctioneer. The plaintiff in his plaint has sought orders for a declaration that the 1st defendant does not hold any valid charge over the suit land and that the charge dated 2nd April 2009 be discharged. In the alternative, the plaintiff has sought a declaration that the attempted sale of the suit land is unlawful, illegal, null and void. The plaintiff has also sought an order of permanent injunction restraining the defendants acting jointly or severally, from taking possession or interfering with the suit land.
5. The supporting affidavit of the plaintiff has elaborated the pleadings. The plaintiff has annexed a copy of the certificate of title to the suit land and a copy of the charge. He has repeated that the user of the suit land is agricultural land within a land control area and that the 1st defendant proceeded to register the charge before consent of the land control board was issued. He on his part, never attended any meeting of the Board for purposes of seeking consent to charge. He has stated that he was never issued with any notices by the bank or auctioneer. He has stated that in the advertisement of 13 February 2012 the 2nd defendant, advertised that he would sell the suit land in the offices of M/s Joyland Auctioneers situated along Ronald Ngala Street, Eldoret Town, which in his view is improper, as a public auction cannot be held in the private offices of an auctioneer. He has deponed that if the suit land is sold, he stands to suffer irreparable loss as that is the only home that he knows.

C. THE DEFENDANTS' CASE

6. The defendants upon being served, filed Replying Affidavits to the subject application. The 1st defendant simultaneously with its reply, also filed a Statement of Defence. The 1st defendant in its Statement of Defence has denied that the plaintiff has been repaying the debt; has averred that it did issue the requisite notices; has pleaded that the consent of the Land Control Board was obtained; that a notice under Section 65(2) of the Registered Land Act, was not necessary because the date for repayment of the money was specified in the charge; and that the plaintiff is still indebted to the bank in the sum of Kshs. 2,097,201.43/= in one account and Kshs. 126,511.38/= in a second account.
7. The Replying Affidavit of the 1st defendant has been sworn by one Michael Maina, an officer in the Barclays Business Support and Corporate Recoveries Department. Inter alia he has deponed that there is no dispute that the plaintiff owes the bank some money. In his view, the plaintiff has misled the court and raised "extraneous concerns". He has deponed that consent of the Land Control Board was obtained on 19th March 2009 and has annexed a copy. The same shows that consent to charge was issued by the Soy/Turbo Land Control Board on 19 March 2009 following a meeting held on the same day. He has also

annexed a statutory notice dated 19th May 2011; has deponed that a notice under Section 65(2) of the Registered Land Act was not required as the date for repayment of the amount was stated in the charge as the seventh day after the date of the charge. Also annexed to the affidavit are Notifications of Sale dated 14th September 2011 and 15th September 2011. The latter is said to have been served personally upon the plaintiff. Mr. Maina has further deponed that the plaintiff is on "a hair splitting exercise, in an attempt to avoid paying a loan which is admitted." He has deponed that the plaintiff has not shown that he will suffer irreparable loss; that the plaintiff is guilty of material non-disclosure; and that the bank has the contractual right to realize its security.

8. On his part, the 2nd defendant has deponed that he is a licenced auctioneer. He has deponed that he personally served the Notification of Sale upon the plaintiff on 15 September 2012. He also served the same Notification of Sale by registered post on 14 September 2012. He has also averred that he served a 45 days Notice upon the plaintiff. He has annexed the said notices. He has averred that it is not a requirement of the law that the reserve price be disclosed in the newspaper advertisement. He has also deponed that the plaintiff had filed a similar suit being Eldoret HCCC No. 207 of 2011 seeking similar orders. He has annexed a copy of the pleadings and an application for injunction filed in that suit.

9. There is a further affidavit sworn by the plaintiff on 15 August 2012 and 11 April 2013. The affidavit of 15 August 2012 has more or less reiterated what is in his supporting affidavit. In the Affidavit of 11 April 2013, the plaintiff has annexed the minutes of the Soy/Moiben Land Control Board. He has averred that there is no record of consent having ever been issued on 19 March 2009 as alleged by the 1st defendant. He also annexed letters from the Auctioneering Licencing Board stating that the 2nd defendant was only licenced to carry out auctioneering business in the year 2011-2012 in the Districts of Nairobi, Kiambu, Kajiado and Garissa Districts only, whereas Joyland Auctioneers were only authorized to carry out auctioneering business in Nairobi district only. He has thus deponed that Dalali Traders, the 2nd defendants were acting without authority as they did not have jurisdiction to deal in a matter in Trans-Nzoia District. He has also deponed that the auctioneer received without his authority or stole the sum of Kshs. 204,858.30/= from the account of Zerlink Investment Agency Ltd and has annexed a statement of account to that effect.

10. A further replying affidavit was filed by the 2nd defendant in which he has averred that as holder of a Class B licence from the Auctioneering Board, he has authority to carry on the business of repossession, realization of securities, sale of moveable and immovable property throughout the Republic of Kenya. He has stated that it is only in execution of court decrees and distress of rent that he is limited to the Districts of Nairobi, Kiambu, Kajiado and Garissa. He has stated that he never delegated his powers to Joyland auctioneers but only meant to use the premises of Joyland Auctioneers to conduct the auction as opposed to carrying out the auction in the open where the weather is not conducive. On the amount of Kshs. 204,858.30/= he has stated that this was payment of his fees received from the 1st defendant.

D. ARGUMENTS OF COUNSEL

11. The application was argued before me on 12 June 2013. Mr. N'geno held brief for Mr. Chemwok for the plaintiff and urged me to allow the application. He stated that the plaintiff contests the validity of the charge as there was no consent issued by the land control board. He stated that the charge is therefore null and void. He relied on various authorities earlier filed being the cases of ***John Muriu Gache v Kama Njuguna & Another HCCA No.64 of 1992***; ***William Ocharo Maangi vs Joseph Onyoni Kombo CA No. 18 of 1995***; ***Lucky Summer Estate Co Ltd & 3 Others vs Kariuki & another (HCCC No 2587 of 1994)***; ***Omolo v Small Enterprises Finance Co. Lted & Another HCCC No. 232 of 1996***; and ***Felix &2 others vs Voi Development Company Limited & 4 others HCCC No. 566 of 1999***.

12. Mr. N'geno referred me to the minutes of 19 March 2009 of the Soy Land Control Board and averred that the same demonstrate that there was no discussion on the day touching on the suit land. He argued that the purported consent could not have been issued without there being a minute on the same.

Mr. Kamau, counsel holding brief for M/s Walker Kontos & Co advocates and M/s Karanja Kiarie & Co Advocates for the 1st and 2nd defendants respectively, stated from the bar that the consent annexed was

supplied by the plaintiff. He stated that the plaintiff has not denied that he obtained the consent. He pointed out that the minutes supplied by the plaintiff are not signed and that they have been certified by a person who is not a member of the Board. He stated that the plaintiff is in default. He also averred that the plaintiff has engaged in inequitable conduct and is thus not entitled to an injunction which is an equitable remedy. No authorities were referred to me by counsel for the defendants.

D. DECISION OF COURT

13. I have gone through the application, the affidavits in support and in opposition to the application. I have also considered the arguments of counsels and the authorities annexed.

14. The case of the plaintiff is based on numerous grounds. These are that there is no valid charge because no consent to charge was ever obtained by the 1st defendant before the charge was registered. The plaintiff has also raised issue that he was never served with a valid statutory notice and that the auction that was scheduled on 16 February 2012 was unlawful as it was going to be conducted by an auctioneer not licenced to perform the auction and that the auction was going to be held in an office of another auctioneer and this therefore cannot be said to be a public auction.

The case of the 1st defendant is that consent to charge was issued. So too the requisite notices before the auction was scheduled. The case of the 2nd defendant is that he is an auctioneer authorized to carry out the subject auction and there was no bar to conducting the auction in the offices of another auctioneer.

15. There is no dispute that a charge was registered against the plaintiff's title. The plaintiff's title is one issued under the regime of the Registered Land Act (CAP 300) Laws of Kenya (now repealed). I have seen a copy of the said charge, drawn by the law firm of M/s Kaplan & Stratton Advocates, and registered on 3rd April 2009. The charge is one of Kshs. 2 Million. Although the plaintiff pleaded that he has been repaying the loan, I have seen from the statements annexed to the replying affidavit of Mr. Maina, on behalf of the 1st defendant, that the plaintiff's account, which appears to be in the business name of Zerlink Investment Agencies is in arrears. There has been no serious contention by the plaintiff that he is not in arrears, save for the unsupported pleading that he has been repaying the loan. Since the plaintiff was in arrears and/or default, the bank was perfectly entitled to exercise its statutory power of sale.

16. I have also seen from the replying affidavit of Mr. Maina, that the plaintiff was served with a statutory notice on 19 May 2011 issued pursuant to the provisions of Section 74(1) and (2) of the Registered Land Act. The notice is copied to the District Commissioner pursuant to the provisions of Section 77(6) of the Registered Land Act. I have seen also that the 2nd defendant issued a 45 days redemption notice on 14 September 2011 issued in accordance with the Auctioneers Rules, 1997. So too the Notification of Sale pursuant to Rule 15(b) of the Auctioneers Rules.

17. The 2nd defendant annexed a certificate of service pursuant to Rule 15(c).

My preliminary take, at this stage of the proceedings, is that the requisite notices were duly issued, although the plaintiff may of course convince me otherwise at the hearing of the suit.

18. I have also seen the advertisement in the Daily Nation newspaper of February 13, 2012, advertising the suit land for sale; the sale was scheduled for 16 February 2012. The auction was scheduled to be held in the offices of Joyland Auctioneers, Safina Plaza, 2nd floor, Room 118, Ronald Ngala Street, Eldoret starting at 10.30am. The plaintiff has raised issue that an auction in a private office is not a public auction. Without making a final determination on this point, my preliminary view is that so long as such office is accessible to the public, then it is difficult to say that the auction is not a public auction. I am also willing at this stage, to give benefit of doubt to the 2nd defendant, that he was authorized to conduct the auction, as he holds a "Class B" auctioneers' licence. The plaintiff may of course convince me otherwise at the hearing of the suit.

19. The one point that has caused me a bit of concern, is the allegation by the plaintiff that no consent to charge was issued, permitting the 1st defendant to register the subject charge against the plaintiff's land.

There is no contention that the suit land is agricultural property. Since it is agricultural property, the provisions of the Land Control Act (CAP 302) apply.

Section 6 of the Land Control Act, is significant to our case. The same provides as follows :-

6. (1) *Each of the following transactions -*

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 2 of the Land Control Act, defines the word "mortgage" as including a "charge".

20. A reading of Section 6(1) above of the Land Control Act, brings one to the inevitable conclusion that a charge will be void for all purposes, unless the land control board for the area in which the land is situated has given its consent.

The 1st defendant has averred that consent to charge was issued and Mr. Maina annexed a consent said to have been issued by the Soy/Turbo Land Control Board. I have seen the said consent. It is said to have been issued by the Land Control Board in its meeting of 19 March 2009, based on an application made on the same day. It states that it is a consent issued for a charge of kshs. 2 million in favor of Barclays Bank Kenya Ltd, the 1st defendant.

21. To support his contention that no consent to charge was ever issued, the plaintiff annexed the minutes of the 19th March 2009, when it is alleged that the consent to charge was issued. I have carefully gone through the minutes and I have not seen any entry with regard to the land parcel Moi's Bridge/Sirikwa Block 2 (Ziwa)/51. Indeed I have not seen any entry touching on either plaintiff or defendant.

22. Mr. Kamau in his submissions stated that it was the plaintiff who brought the said consent to the 1st defendant. This was a statement from the bar unsupported by any deposition by the 1st defendant, and I cannot in the circumstances affirm that that is the position. If indeed, the Land Control Board issued consent on 19th March 2009 as alleged by the 1st defendant, then it is expected that there would be a minute of the same in the Board proceedings of 19 March 2009. There is none, and the only import, barring any other evidence to the contrary, is that no consent of the Land Control Board was issued to authorize the registration of a charge against the plaintiff's title. Mr. Kamau stated that the minutes annexed by the plaintiff are not signed and have been certified by an officer who is not a member of the Board. That may be so, but I think prima facie, the plaintiff has demonstrated that there was no minute in which consent to charge was issued on 19 March 2009. The 1st defendant had the freedom to annex minutes showing that consent to charge was issued but it has not done so.

23. There are numerous authorities that emphasize the provisions of Section 6(1) of the Land Control Act. The authorities relied upon by the plaintiff are only some of these. The provisions of Section 6(1) are themselves clear. Consent of the Land Control Board is required before the registration of a charge if the land is agricultural land. If no consent is issued, then the charge is void for all purposes. In our case, I think the plaintiff has demonstrated, prima facie, that no consent was ever issued.

I am therefore prepared to hold that the plaintiff has demonstrated a prima facie case with a probability of success. There is no doubt that he will suffer irreparable loss if the 1st defendant sells the suit land in exercise of its statutory rights. The plaintiff has satisfied the principles laid out in the case of ***Giella vs Cassman Brown***. I therefore issue an order of injunction stopping the 1st defendant by itself or through its servants/agents from offering for sale or selling the suit land until the final determination of this suit. I also bar the 1st defendant either by itself or through its servants/agents from dealing in any other way with the suit land until the final determination of this suit.

I also award the plaintiff the costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. D.O. Wabwire holding brief for Mr. Chemwok of M/s Chemwok & Co for the plaintiff.

Miss E.C. Rono holding brief for M/s Walker Kontos & Co for 1st defendant.

N/A for M/s Karanja Kiarie & Co for the 2nd defendant.