



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 55 OF 2012**

**IN THE MATTER OF LIMITATIONS OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA**

**AND**

**MONDA MATUNDURA .....APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LTD ..... RESPONDENT**

**RULING**

1. The applicant (hereinafter referred to only as “the plaintiff”) brought this suit against the respondent (hereinafter referred to only as “the defendant”) by way of originating summons on 15<sup>th</sup> February 2012 seeking the determination of among others the following questions;
  - i. **Whether the charge that was executed by the plaintiff in favour of the defendant over LR No. Nyaribari Chache/Keumbu/587 on 8<sup>th</sup> June 1993 has lapsed by operation of law under the Limitation of Actions Act, Cap 22 Laws of Kenya and if so, whether the said charge should be discharged"**
  - ii. **Whether it is in order for the defendant to continue claiming any money from the principal debtor one, Jason Makori N. Monda to whom the plaintiff had stood guarantor and had offered the said LR Nyaribari Chache/Keumbu/587 (hereinafter referred to as “the suit property”) as a security, and to opt to sell the suit property the defendant having filed a suit and obtained judgment against the said Jason Makori N. Monda in Nakuru HCCC No. 181 of 1995 on 5<sup>th</sup> June 1996 which decree the defendant has failed to execute and the execution of which is now barred under the Limitation of Action Act, Cap 22 Laws of Kenya"**
  - iii. **Whether or not the defendant’s claim against the plaintiff on the basis of the said charge over the suit property has any basis"**

**iv. Whether there should be a declaration that the plaintiff is not liable to the defendant for the debt due and owing by the said Jason Makori N. Monda to the defendant and that the charge that had been executed by the plaintiff over the suit property should be discharged absolutely"**

2. The plaintiff's originating summons was brought under order 37 of the Civil Procedure Rules. The same was supported by the affidavit of the plaintiff sworn on 10<sup>th</sup> February 2012. In the said affidavit, the plaintiff stated that; sometimes in the year 1993, the plaintiff charged the suit property to the defendant to secure a loan of kshs. 1,000,000/= that had been advanced to the plaintiff's son one, Jason Makori N. Monda (hereinafter referred to only as "Makori") by the defendant. Makori defaulted in his loan repayment obligations to the defendant as a result of which the defendant instituted a civil suit against him in the High Court of Kenya at Nakuru for the recovery of the amount then outstanding in, Nakuru HCCC No. 181 of 1995. On 5<sup>th</sup> June 1996, the defendant obtained a consent judgment against Makori and on 1<sup>st</sup> July, 1996 a decree was issued in favour of the defendant. The defendant failed to execute the decree aforesaid against Makori and the execution of the same is now barred under the Limitation of Actions Act, Cap 22 Laws of Kenya.
3. The plaintiff has contended that the enforcement of the charge that he executed in favour of the defendant on 8<sup>th</sup> July 1993 to secure the loan that was advanced to Makori is also barred under the Limitation of Actions Act, Cap 22 Laws of Kenya. The plaintiff has contended further that despite the fact that the enforcement of the said charge is barred as aforesaid, the defendant is still keen on selling the suit property in purported exercise of its nonexistent statutory power of sale. The plaintiff has contended that the defendant's attempts to sell the suit property has no basis in law and should be declared improper and unlawful. The plaintiff has contended further that, the defendant having obtained a decree against Makori who was the principal debtor the execution of which decree is now time barred, the defendant has no right to demand the monies allegedly due to it from Makori and, if no monies are due by Makori to the defendant, none can be recovered from the plaintiff who was Makori's guarantor. The plaintiff has contended that no monies are due by the plaintiff to the defendant and as such the intended sale of the suit property by the defendant is improper.
4. On 28<sup>th</sup> March, 2012, the plaintiff filed an application under certificate of urgency seeking a temporary injunction to restrain the defendant from selling, disposing of and/or in any way alienating the suit property pending the hearing and determination of this suit. This is the application that is before me for determination. The plaintiff's application was supported by the affidavit of the plaintiff in which he reiterated the contents of his affidavit in support of the originating summons which, I have highlighted above in detail. The plaintiff added that, after the filing of the originating summons herein, he was served with a notice by Garam Investments Auctioneers acting on behalf of the defendant that the suit property would be sold by public auction on 24<sup>th</sup> April 2012. The plaintiff has contended that the intended sale is aimed at defeating this suit. The plaintiff has contended further that the amount being claimed by the defendant and which is intended to be recovered at the intended auction is kshs.5,310,130.10 which amount has been arrived at contrary to the provisions of the Banking Act.
5. The plaintiff's application was opposed by the defendant through a replying affidavit sworn by Damaris Gitonga, the defendant's general manager in charge of legal and credit remedial services on 13<sup>th</sup> April, 2012. In the said affidavit, the defendant termed the plaintiff's application an abuse of the process of the court and accused the plaintiff of material non disclosure. The defendant admitted that the plaintiff had charged the suit property in its favour to secure a loan in the sum of kshs. 1,000,000/= that was advanced by the defendant to Makori. The defendant admitted further that Makori defaulted in his loan repayment to the defendant which resulted in the defendant filing a civil suit at Nakuru namely, Nakuru HCCC No. 181 of 1995 (hereinafter

referred to as “the Nakuru suit”) against Makori to recover the amount then due to the defendant from Makori. The defendant admitted that a consent judgment was entered for the defendant in the Nakuru suit against Makori. The defendant contended that after this judgment, Makori’s account was restructured at his request for ease of management of payment and that despite this restructuring Makori defaulted again in servicing the loan that prompted the defendant to revive the loan recovery action against Makori and the plaintiff who had executed a charge to secure Makori’s indebtedness to the defendant.

6. The defendant contended that, following this move, Makori made another repayment proposal that was accepted by the defendant on 7<sup>th</sup> October 1998 which proposal Makori did not adhere to resulting in the defendant serving the plaintiff herein and Makori with a statutory notice on 8<sup>th</sup> September 1998 through the firm of Wangong’u & Company Advocates demanding the payment of the sum of kshs. 2,585,953.60 as at 30<sup>th</sup> March 1998 then due by Makori and the plaintiff to the defendant in default of which the defendant would put up for sale the suit property for the recovery of the same.
7. The defendant contended that on receipt of this notice, Makori made another repayment proposal that was accepted by the defendant. Makori did not however honor the terms of this proposal in that he was erratic and irregular in remitting the payments that had been agreed upon with the defendant. The last of such irregular payments in the sum of kshs. 100,000/= was made on 29<sup>th</sup> August 2005. The defendant contended that in view of the failure by Makori to adhere to the loan repayment terms that had been agreed between them, the defendant wrote to Makori on 21<sup>st</sup> June 2006 cancelling the loan rebate that the defendant had given to him and calling upon him to pay the entire debt then outstanding amounting to kshs. 5,166,358.10 in default of which the defendant would realize its security over the suit property.
8. The defendant contended that upon receipt of this letter, the plaintiff and Makori filed a suit against the defendant at the High Court in Kisii namely, Kisii HCCC No. 154 of 2006 (hereinafter referred to as “the Kisii suit”) challenging the defendants right to claim the said sum of kshs. 5,166,358.10 and seeking an order for taking of accounts. The defendant contended that the said suit was dismissed for want of prosecution on 20<sup>th</sup> September 2012. The defendant contended that both Makori and the plaintiff are still indebted to the defendant and that the loan agreement between Makori and the defendant was renewed and revived from time to time and as such the recovery of the amount outstanding is not time barred as claimed by the plaintiff herein. The defendant denied that the consent judgment against Makori was never enforced. The defendant contended that Makori made payments to the defendant pursuant to that judgment up to 29<sup>th</sup> August 2005 and as such if time was to run against the defendant, it would be reckoned from that date. The defendant contended that since Makori is still indebted to the defendant, the defendant is entitled to exercise its statutory power of sale over the suit property that was charged to it to secure Makori’s indebtedness to it.
9. On 13<sup>th</sup> March 2014, the advocates for the parties agreed to argue the plaintiff’s application by way of written submissions. Both parties filed their submissions on 28<sup>th</sup> July 2014. I have considered the plaintiff’s application together with the replying affidavit filed by the defendant in opposition thereto. I have also considered the respective submissions by the parties’ advocates and the authorities cited in support of the same. The principles on which this court grants interlocutory injunction are now well settled. An applicant for interlocutory injunction must establish a prima facie case with a probability of success against the respondent and must also demonstrate that unless the order is granted, he would suffer irreparable injury. In the event that the court is in doubt as to the above, the application would be decided on a balance of convenience. See, **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358 and Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. The plaintiff’s claim herein is premised on the provisions of section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

10. The plaintiff's contention is that the defendant's right to recover monies due to the defendant from Makori has been extinguished pursuant to the provisions of section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya (hereinafter referred to only as "the Act") and as such, the plaintiff who had executed a charge to secure Makori's indebtedness aforesaid is equally discharged from any liability in respect of that debt. The plaintiff has contended that in the circumstances, there is no debt on account of which the defendant's statutory power of sale can attach and be exercised. It is not in dispute that Makori borrowed a sum of kshs. 1,000,000/= from the defendant which amount was secured by a charge over the suit property which is owned by the plaintiff. It is also not in dispute that Makori defaulted in his loan repayment to the defendant as a result of which the defendant instituted the Nakuru suit and obtained judgment against him by consent on 5<sup>th</sup> June 1996 in the sum of kshs. 881,310.40.
11. Pursuant to the terms of the said judgment, Makori was to pay the decretal amount in quarterly installments of kshs.124,540.35 with effect from 31<sup>st</sup> August 1996 and thereafter on or before the 31<sup>st</sup> of each subsequent quarter until payment in full within a period of 48 months. It was also a term of the said judgment that in the event of default by Makori to pay any one installment on due date, the defendant was entitled to execute the decree. It is not in dispute that Makori did not honour the terms of the said consent judgment. From the material before me, it is clear that by 10<sup>th</sup> June 1997, Makori had already defaulted in his payment obligations under the said judgment. The defendant's right under the said judgment to levy execution for the recovery of the decretal amount had therefore accrued. There is no evidence before me that the defendant executed the said judgment against Makori. The plaintiff's contention that his advocates on record perused the Nakuru suit court file in January, 2012 and confirmed that the decree against Makori had not been executed has not been controverted.
12. As I have stated above, the defendant's right to recover the amount that was due to it under the decree issued in the Nakuru suit accrued in June, 1997 when Makori defaulted in the payment of the agreed quarterly installments. I am in agreement with the contention by the plaintiff that, pursuant to the provisions of section 4 (4) of the Act, the time within which the defendant was to recover the decretal amount that was due to it under the judgment aforesaid started running in June, 1997 and expired in June 2009 after 12 years. I am not persuaded with the defendant's contention that the time provided for under section 4 (4) of the Act aforesaid was extended by Makori's subsequent erratic and irregular attempts to pay the decretal amount.
13. There is no evidence that Makori complied with the terms of the said consent judgment at any time after June, 1997 on the basis of which it can be said that he held himself to be still bound by the terms of the said judgment. If the defendant's right to recover the decretal amount from Makori became extinguished by operation of law in June, 2009 as aforesaid, it follows that the debt that was due by Makori to the defendant was equally extinguished and became irrecoverable. This being the same debt that was secured by a charge over the suit property, the extinguishment of the same left no debt upon which the said charge could attach. The plaintiff's argument that he is not indebted to the defendant and that there is no basis upon which the defendant can purport to exercise statutory power of sale over the suit property is in the circumstances well founded.
14. Due to the foregoing, I am persuaded that the plaintiff has established a prima facie case with a probability of success against the defendant. I am aware that the defendant is a bank and as such is capable of paying damages to the plaintiff in the event that the sale of the suit property proceeds and it is found at that trial that the sale was wrongful. As I have stated above, there seems to be no basis for the intended sale of the suit property and if the sale was to be undertaken, the exercise would be illegal. The questions that I must ask myself are, first, whether I should allow an illegal process to proceed because the person who is undertaking the process can pay for the illegality and secondly, whether I should force the plaintiff herein who has shown that he is entitled to an injunction to take damages. My answers to the two questions are

in the negative. In this country, loss of land does not attract purely economic consequences. It affects those concerned also in other areas of their lives. I am satisfied that in the circumstances of this case, the plaintiff would suffer irreparable injury if the injunction sought is not granted.

15. In conclusion, it is my finding that the plaintiff has satisfied the conditions for granting interlocutory injunction. The plaintiff's Notice of Motion application dated 19<sup>th</sup> March, 2012 is allowed in terms of prayer (c ) thereof. The plaintiff shall have the costs of the application.

**Delivered, signed and dated at KISII this 21<sup>st</sup> of November, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

..... for the plaintiff

..... for the defendant

..... Court Clerk

**S. OKONG'O**

**JUDGE**



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