REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 181 OF 2015

JOSEPH KIPKORIR CHERUIYOT……1ST PLAINTIFF

JOSMAR INVESTMENT COMPANY LIMITED……2ND PLAINTIFF

VERSUS

EQUITY BANK (K) LIMITED……1ST DEFENDANT

PROTUS WANGA T/A TIMELESS DOLPHIN AUCTIONEERS……2ND DEFENDANT

RULING

The plaintiffs/applicants have come to court by way of Notice of Motion praying that a temporary injunction be issued restraining the 1st and 2nd defendants jointly and/or severally by themselves or their agents from offering for sale, selling by public auction or private treaty, exercising statutory power of sale or otherwise dealing adversely, transferring, alienating or dealing otherwise or in any manner with the parcels of land comprised in title No. ***MOSOP/NYARU/252*** and ***ELDORET MUNICIPALITY BLOCK 15/1854*** pending the hearing of the suit.

The application is based on grounds that the 1st plaintiff is the registered absolute proprietor of that parcel of land comprised in Title L. R. No. MOSOP/NYARU/252 and that the 1st defendant has clogged the plaintiffs' equity of redemption by shifting the goal posts every now and then. The said properties are now slated for sale on 1st July, 2015 at Eldoret town. That land reference No. MOSOP/NYARU/252 (measuring approximately 4.2 Ha) and substantially developed and which is the 1st plaintiff's matrimonial home, is registered in the name of the 1st plaintiff. While the latter one, that is, the land comprised in Title No. ELDORET MUNICIPALITY/BLOCK 15/1854 (undeveloped) belongs to the 1st plaintiff.

The plaintiff contends that on or about 10th January, 2011, the 1st plaintiff charged the said properties to the 1st defendant as security for a credit facility of Kshs.2,800,000.00 extended to the 2nd plaintiff. The 2nd plaintiff borrowed Kshs.2,400,000.00 against the former property and Kshs.400,000 against the latter property. In the same year (i.e. in 2011), the 1st defendant gave the 2nd plaintiff a loan facility of Kshs.570,000.00. The 2nd plaintiff, a transporter, suffered massive loss due to theft of its customers' goods and this interfered with its effort to repay the loan. Vide the sale agreement dated 31st May, 2012, the 2nd plaintiff, with the consent of the 1st defendant, disposed of its Trailer No. ZC 1858 in order to offset part of the loan. The said trailer was sold at Kshs.700,000 and the proceeds therefrom were taken by the 1st defendant. Later, the 1st defendant sold the 2nd plaintiff's prime movers Nos. KAU 770T, KAU

678U and KAR 277S (3 unites). According to the plaintiffs, the estimated total sum of the said prime movers was Kshs.4,500,000. By selling the said lorries, the 1st defendant paralyzed the plaintiffs' efforts to redeem the said properties. The clogging of the plaintiffs' equity of redemption then begun in earnest. The plaintiffs, in their quest to see it that their valuable properties are not sold at throw away prices have scouted for buyers with the knowledge and expressed consent of the 1st defendant and have even gotten buyers for the said parcels of land but the 1st defendant has created further hurdles and yet it had given the plaintiffs ago ahead to get the buyers.

The plaintiff further states that the 1st defendant has failed to inform the plaintiffs as regards the proceeds of the sale of the said prime movers and further it has failed to give credit to the 2nd plaintiffs on the basis of the proceeds of Trailer No. ZC 1858. The 1st defendant has thus infringed on the constitutional rights of the plaintiffs by withholding vital information from the said plaintiffs. That the defendants, acting on behalf of some cartels, are hell-bent on selling the said properties at throw away prices. That it is therefore fair and in the interest of justice that orders do issue accordingly in order to prevent the plaintiffs, who have already lost prime movers, from suffering an illegality and irreparable loss. That the defendants' actions are illegal and need to be arrested. That the plaintiffs have a prima facie case with high chances of success. That the plaintiffs stand to suffer irreparable loss in the event that the said properties are sold. The plaintiffs contend that the advertisement for sale of their property was not in compliance with section 90 of the Land Act, 2012.

The defendants' response is that the 1st defendant advanced various facilities to the 2nd plaintiff as hereunder:

(i) By a letter of offer dated 10th January, 2011, the bank advanced Kshs.2,800,000 to the 2nd plaintiff secured by the following facilities:

- ***An existing personal guarantee by Margaret Jemutai Chebet, supported by an existing charge in favour of the bank over property title No. Eldoret Municipality Block 15/1854 securing Kshs.2,400,000 and***
- ***An existing personal guarantee by the 1st plaintiff supported by an existing charge in favour of the bank over property title No. Mosop/Nyaru/252 securing Kshs.400,000.***

This loan was disbursed on 12th March, 2011 to loan account No. 0010597111963 and is currently outstanding at Kshs.3,452,446.74 as of 7th July, 2015. It is worth noting that the loan continues to accrue interests.

(ii) By a letter of offer dated 16th June, 2011, the bank advanced a loan facility of Kshs.2,800,000 securing by joint registration and chattels registration over motor vehicle registration No. KAU 770, KAU 678U, KAR 227S & 1858.

This loan was disbursed on 16th June, 2011 to loan account No. 0010597484861 and is currently outstanding at Kshs.3,172,006.40 as of 7th July, 2015.

He avers that the total outstanding liability owed to the 1st defendant by the 2nd plaintiff is Kshs.6,624,952.49 as at 7th July, 2015. Further, that the chargors to the suit properties are the directors of the 2nd plaintiff. The defendant states that both spouses in the charged property signed the deed of guarantee and indemnity therefore the spouse herein had consented to the creation of the charge and hence cannot cry foul later. The 2nd plaintiff defaulted in the repayment of the loan prompting the 1st defendant to commence the security realization process.

A three (3) months demand notice dated 18th September, 2013 was sent to the 2nd plaintiff with separate copies to both chargors. The 2nd plaintiff failed to regularize its account prompting the 1st defendant to issue a 90 days' notice to sell dated 19th March, 2014 and addressed to the chargors' separately with copies to the 2nd plaintiff. The 1st defendant further issued a notice dated 17th April 2015 allowing the chargers 40 days to redeem their property. The said notices were all issued to the correct address as indicated in the documents availed to the bank by the plaintiffs and requisite proof of posting obtains. The 1st defendant has allowed the plaintiffs and borrowers ample time to redeem the suit properties which they failed and as such any claims to the contrary are malicious and aimed at misleading this honourable Court. The bank issued instructions dated 17th April, 2015 to the 2nd defendant/Auctioneer to proceed with the sale of the property in compliance with the provisions of the law.

He states that the plaintiffs had approached the 1st defendant for indulgence on exercise of its statutory power of sale with proposals on payment. The proposals did not materialize due to the plaintiffs' failure to see them through, forcing the 1st defendant to proceed with the recovery. Towards the auction date, the 1st defendant received several requests from Advocates acting on behalf of potential purchasers seeking to purchase the charged properties. The multiple requests/proposal for purchase of the properties were not accompanied by a sale agreement or proof of payment of the deposit and appeared to have been well calculated moves to delay payment.

The 1st defendant responded to B. N. Kiptoo Advocates upon receiving a confirmation from the plaintiffs to disclose information to them. The bank's response was a conditional acceptance of the offer to purchase. The bank did not receive a counter offer or any further communication from the prospective purchaser to warrant withdrawal of the auction instructions.

The defendant believes that the Applicants are not entitled to the equitable remedy they seek as they themselves have not done equity and have approached this court with unclean hands due to the following reasons:-

(a) By a letter dated 30th May, 2013, the plaintiffs wrote to the 1st defendant and expressed their intention to dispose trailer registration No. ZC 1858 to Ruiru Feeds Ltd for a sum of Kshs.700,000. The 1st defendant allowed the transaction and a cheque of Kshs.700,000 was deposited from Ruiru Feeds Ltd to the 2nd plaintiff's account No. 0240290652660 on 29th July, 2012.

(b) The 1st defendant in efforts to realize the securities issued instructions to Excellence Auctioneers to repossess motor vehicle Registration No. KAU 678 U, KAR 277S AND KAU 770T.

(c) The plaintiffs had hidden the motor vehicles in different storage yards which Excellence Auctioneers were able to locate following investigations.

(d) The plaintiffs had stored motor vehicle KAR 277S at Comet Freight and Travel Ltd who demanded storage fees amounting to Kshs.131,250 as to 26th July, 2013 before releasing the motor vehicle to the bank. The 1st defendant was forced to pay the storage fees before repossessing the motor vehicle.

(e) The motor vehicle was sold by public auction for a sum of Kshs.320,000. This sale was following several attempts to sell the motor vehicle to no avail.

(f) The plaintiffs had also stored motor vehicle KAU 678U at a yard owned by Harde Logistics Limited, who raised a fee note for a storage charges demanding Kshs.669,000.00 as at 25th July,

2013. The storages outweighed the valued value of the motor vehicle forcing the bank to abandon it all together.

(g) Motor vehicle KAU 770T was sold by public Auctions for Kshs.400,000. This was following several attempts to sell the motor vehicle to no avail.

The monies in (d), (e) and (f) were applied to the loan after deduction of the requisite expenses.

The plaintiffs have failed to disclose to this court that the 1st plaintiff was in arrears as regards the financial facilities advanced to them and guaranteed by the 1st plaintiff.

The grant of the orders sought in the said application would greatly prejudice the 1st defendant as the debt has already outstripped the values of the suit properties and which continues to grow and hence imperative for the 1st defendant to allow to salvage what it can. The stoppage of the intended sale by the plaintiffs would result in continued growth of the debt and thus exposing the 1st defendant to potentially substantial irreparable losses. The applicants have admitted being indebted to the 1st respondent and should not use this honourable court to further an injustice.

I have considered the application, supporting affidavit, replying affidavit and do find that on 10.1.2011, Josmar Investment Ltd applied for a business loan of Kshs.2,800,000.00 to be repaid in 60 months. The 1st defendant advanced the plaintiffs the loan and secured the suit properties and disbursed the loan. The 1st defendant advanced a further Kshs.2,800,000.00 and secured a joint registration of motor vehicle registration number KAU 770T, KAU 678U, KAR 227S, ZC 185. According to the 1st defendant, the total amount outstanding is Kshs.6,624,952.49 as at 7.7.2015. The charges are the Director of the plaintiff, one of them being the 1st plaintiff. There is no dispute that spousal consent was obtained before the charge. There is no reply by the applicants on the allegation by the 1st defendant that the total outstanding sum is Kshs.6,624,952.49.

I have looked at the documents supplied by the 1st defendant and do find that the plaintiffs were given the three months demand notice on 18.9.2013, the statutory notice of sale in compliance of section 90 of the Land Act on 19.3.2014, sent to their supplied Address of 44093, Nairobi and the redemption notice on the 17.4.2015. I do not see any evidence that the 1st defendant has clogged the equity of redemption as the sale of the motor vehicles were in respect of the second loan advanced by the 1st defendant.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. ***Prima Facie*** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a ***Prima Facie*** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. I do find that the plaintiffs have not established a prima facie case with a probability of success as the 1st defendant followed due process. Moreover, there is evidence that the plaintiff is in arrears and the loan is outstanding.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that ***irreparable injury*** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The plaintiff is not likely to suffer irreparable loss as the defendant being a financial institution, he is capable of compensating the plaintiff in the event he succeeds in the main suit. In any event, upon

charging the property, it became a commodity for sale and therefore, it cannot be said that the plaintiff will suffer irreparable loss.

The court should issue an injunction where the ***balance of convenience*** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of ***balance of convenience*** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the ***balance of inconvenience*** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. I do find that it tilts towards not granting the injunction as the outstanding amount is likely to outstrip the values of the suit properties as it continues to grow. The application is hereby dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF SEPTEMBER, 2017.

A. OMBWAYO

JUDGE