



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 172 OF 1991

HASSAN KIPKEMBOI NGENY.....APPLICANT

VERSU

THABITI FINANCE CORESPONDENT

RULING

This is a ruling in an application by way of chamber summons seeking a temporary injunction to restrain the defendants from selling the suit premises namely Nandi/ Chepkongeny/553 until the case is heard.

The grounds are set out in the annexed affidavit as well as oral representations in open Court and are as follows:

1. That the applicant is paying the loan regularly through proceeds of milk sales.
2. The entire family relies on the suit land for their livelihood and if it is sold then the whole family will suffer irreparable harm.
3. That applicant is a teacher and he doesn't have sufficient funds to pay off the whole loan at once.
4. That they are disputing the mode of calculating the total due to the respondent.

The respondent on the other hand put in grounds of opposition as well as a replying affidavit and further affidavit with annexure.

1. That the manager in his affidavit has shown how the amount was calculated.
2. That applicant has not made any effort to pay evidenced by the fact that since 1987 he has paid only Shs 6,500/= towards loan repayment.
3. The applicant does not deny his indebtedness to the Bank but he is only employing delaying tactics in trying to deny the respondent the fruits of its judgment.
4. In 1988 he was given a chance to liquidate the debt but he failed to do so.
5. The applicant promised to pay Shs 15,000/= by end of January 1992 but he has not done so.

Having heard both parties and having perused their affidavits in support as well as annexures, it is clear that the relief sought is an equitable remedy governed by the maxim that he who comes to equity must come with clean hands.

The principles governing granting of such a relief are well known, namely;

1. The applicant must know that his case has a likelihood of success.
2. That if not granted he will suffer irreparable harm.
3. That damages will not be an adequate recompensation.

On perusal of the plaint, it is clear that in paragraph 6 and 7 of the same, the applicant seeks to liquidate the loan through instalments as from October 1991. He was to make a lumpsum payment as at 10th January 1992 and then increase the instalments. The respondent says no such has been made and no instalments are being paid.

From the record, it is clear that indebtedness is not denied. It is also clear that instalments are not being paid and so the plaintiff's chances of succeeding in the case are nil. Ground one is therefore disposed off.

As for ground 2, the Court saw the valuation report on the file. It is of value. However it is upon the applicant to try and save it. If it is sold, it is true he will suffer irreparable harm but this should not be used as a cane to deny the respondent the fruits of his judgment.

Coming to the last requirement, it is true the amount claimed is large but in view of the fact that no effort is made to liquidate the same, then no damages can arise in such a situation except where the property may be sold for a lesser value than its market price.

The last consideration in such a case is that applicant must furnish security. The applicant has not offered any.

From the above, it is clear the applicant does not fall within the protection of the four principles governing such relief. However, the Court will exercise its discretion in the best interest on the following terms:

1. A temporary injunction do issue pending the hearing of the suit on the condition that the applicant do deposit with this Court Shs 20,000/= within one month from today's date for the respondent.
2. When condition 1 is complied with then he will have liberty to liquidate the balance by monthly instalments of Shs 2,000/= with effect from one month upon deposit of the amount in item 1.
3. Failure to comply with order 1 and 2 or both the respondent be at liberty to proceed to re-advertise the property for sale.
4. Should condition 1 and 2 be complied with then the applicant will furnish security in the sum of Shs 10,000/=.
5. The respondent will have costs of this application.

Dated and delivered at Eldoret this 26 day of February , 1992

R.N WALEKHWA

JUDGE



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