



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 569 OF 2011

RICHARD KIEMA MUTISO.....APPELLANT/APPLICANT

VERSUS

UNITED NATIONS SACCO LTD.....1ST RESPONDENT

JOSEPH NYUTU KAMAU T/A PHTUMA AUCTIONEERS.....2ND RESPONDENT

RULING

1. The application dated 4th December, 2014 seeks the following orders, *inter alia*:-

- a) ***THAT the Respondents jointly and severally, their servants or agents be and are hereby restrained by an order of injunction from selling, offering for sale, advertising, threatening to sell or in any other way dealing with the Appellant's property known as LR. No. KAJIADO/KITENGELA/2112 situate at Kajiado County scheduled for sale by public auction on 5th December, 2014 pending the hearing and determination of the Appeal.***
- b) ***THAT this Honourable Court make an order for the taking of accounts between the Appellant and the 1st Respondent to establish the exact amount owing to the 1st Respondent, if any.***
- c) ***THAT the Appellant/Applicant be given eight months (8) to regularize any arrears in his loan account after proper accounts have been taken.***
- d) ***THAT costs of this application be provided for.***

2. The application is premised on the grounds stated in the body of the application and is supported by the affidavit sworn by the applicant, **RICHARD KIEMA MUTISO**. The application is opposed. Two affidavits sworn by **CLEMENT TUNOI** the CEO of the 1st respondent, United Nations Sacco Ltd were filed in opposition to the application.

3. The applicant's case is that on 26th October, 2006, while he was an employee of the United Nations, he applied for a loan of Kshs.1,000,000/= from the United Nations Sacco Society Ltd (hereinafter Society). The repayment period was sixty months with an interest rate of 1.25% per month calculated on a reducing balance. The loan was secured against applicant's property known as KAJIADO/KITENGELA/2112.

4. In December, 2006, the applicant lost his job and was unable to service the loan. The Society threatened to realize the security if the loan account was not regularized. The applicant made promises to

pay by monthly installments but this never came to be. The Society advertised the charged property for sale. In order to regularize the loan account, the applicant paid a sum of Kshs.600,000/- which he stated his wife borrowed from another institution in order to save their matrimonial home.

5. The applicant then demanded for a copy of the loan statement to see how the sum of Kshs.2,174,440/- stated in the Statutory Notice had accrued against the principal sum of Kshs.1,000,000/- borrowed. The applicant was aggrieved to see that the payments he had made were credited by the Society against his normal loan which was guaranteed by shares instead of crediting the payments made against the development loan secured by the property the subject matter of this suit. The applicant was also aggrieved by the valuation of the property at Kshs.4.7million and stated that the open market value of the property is approximately Kshs.9million.

6. In the month of April 2011, the applicant received another Notice from the auctioneer giving the outstanding amount as Kshs.2,457,398.61/-. The property was advertised for sale. The applicant moved to court by instituting this suit before the Co-operative Tribunal to stop the sale. The applicant's application for injunction was dismissed by the Co-operative Tribunal. That is what triggered this appeal.

7. The applicant termed the Statutory Notice of Sale as defective and stated that the same did not specify whether the Kshs.2,174,440/- was interest only or whether it included the principal sum. That the Statutory Notice was issued in the year 2009 whereas the sale was scheduled for 5th December, 2014. The applicant further averred that the Statutory Notice did not take into account the Kshs.600,000/- he paid in August, 2010 and the Kshs.150,000/- he paid in October, 2011. The applicant engaged the services of IRAC which calculated the outstanding balance for the Kshs.1,000,000/= secured loan as Kshs.1,135,516 as at 30th June 2011.

8. The Society on the other hand accuses the applicant of failing to disclose material facts which include the applicant's failure to meet the terms of the conditional stay granted by the Co-operative Tribunal and the applicant's failure to disclose to the court his other loans with the Society for Kshs.820,000/= obtained on 6th March, 2006 and for Kshs.200,000/= obtained on 19th June, 2006.

9. According to the Society, the applicant ought to prosecute his case which is still pending at the Tribunal. It is the contention by the Society that this court's jurisdiction is an appellate one yet the applicant has not taken any steps to serve them with the Memorandum of Appeal nor taken any steps to prosecute the appeal. The Society has stated that it has given the applicant a lot of indulgence and it ought to be allowed to exercise its power of sale.

10. The Society has termed the calculation of the balance by IRAC as incorrect and based on the applicant's instructions which did not take into account that the sum of Kshs.600,000/= was partially applied to settle the applicant's unsecured loan. That in any event, even IRAC found that the applicant owed the Society Kshs.135,516.07/- which amount the applicant has not paid to date.

11. I have considered the material placed before me and the oral submissions. I will first deal with the issue of jurisdiction. Section 81 of the Cooperative Act provides for appeals from the Tribunal to go to the High Court.

Section 81 (2) (c) of the Co-operative Act states as follows *inter alia* on the powers of the High Court:

***“exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought;*”**

Order 42 rule (6) (6) of the Civil Procedure Rules states as follows:

“Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate

court or tribunal has been complied with.”

12. The Cooperative Tribunal delivered its Ruling on 19th October, 2011. The appeal herein was filed on 2nd November, 2011. The applicant has therefore complied with the procedures for the filing of an appeal before this court. This court therefore has the requisite jurisdiction to determine whether or not to grant the order of injunction sought. However, the prayers for the taking of accounts and for giving time to the applicant to regularize his loan account fall within the original jurisdiction of the Co-operative Tribunal.

13. On whether to grant or refuse an injunction, the principles applicable were well settled in the case of ***GIELLA –VS- CASSMAN BROWN & CO. (1973) EA***. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss would be suffered and if in doubt, the court will decide on a balance of convenience.

14. It is not in dispute that the applicant obtained a loan of Kshs.1,000,000/= which was secured against the property in question. It is also common ground that the applicant fell into repayment arrears for the secured loan on both the principal sum and the agreed interest of 1.25% per month calculated on a reducing balance; that the applicant has other loans with the Society which are also in arrears and that these other loans are guaranteed by shares.

15. The applicant’s contention that the Statutory Notice includes the arrears for the loans not secured by the property advertised for auction is supported by the Society’s own documents. The letter by the counsel for the society dated 27th March, 2009 (***annexture “RRM2”***) reflects the loan amount against which the property was charged as Kshs.1,000,000/- and the balance as 1,267,699/-. The Statutory Notice dated 19th August 2009 (***annexture “RKM4”***) reflects the loan balance as 2,174,440/=. By 7th February, 2011 the loan balance was reflected as 2,457,398.61/- in the Notice served on the applicant by the auctioneers.

16. By the date 17th August, 2010, when the applicant wrote to the 1st respondent enclosing two cheques for the payment of a total of Kshs.600,000/= the applicant did not separate the issue of the loan secured against the property in question from the other unsecured loans. The applicant sought indulgence from the 1st respondent and made a proposal to pay the balance. The applicant’s letter referred to his ***“Loan account with the Co-operative”*** and did not specifically refer to the Kshs.1,000,000/= secured loan. The society on the other hand has taken the position that all the payments by the applicant were credited in his unsecured loan accounts. I do not see any irregularity in the position taken by the society since the parties had been negotiating on payments regarding all the applicant’s loans.

17. The statement exhibited by the Society reflects a balance of Kshs.1,382,841.46 as at 31st August, 2009 (***annexture “CT3”***) yet the sum of Kshs.2,174,440 is what is reflected on the Statutory Notice which is dated 19th August, 2009. This gives credence to the applicant’s evidence that the Society lumped up both the secured and the unsecured loan. This court’s view is that the Society was only entitled to exercise its statutory power of sale for the amount secured against the property in question. *Prime facie*, I find the Statutory Notice was defective.

18. On the issue of whether the calculations for the outstanding amount were correct or not, this would not qualify as a ground for a grant of an injunction. (See for example the case of ***FARMERS PARTNER LTD –VS- BARCLAYS BANK OF KENYA LTD (2010) eKLR***)

19. Although the applicant has described the suit property as a matrimonial home, it is noted that the applicant offered the same as security. The applicant’s conduct in charging the property made it a commercial property. The loss can therefore be compensated by damages (see for example the case of ***NYANZA FISH PROCESSORS –VS- BBK LTD. (2009) eKLR***)

20. On whether there was failure by the applicant to disclose material facts to the court, I find that applicant’s application included annexed documents, for example, the Statutory Notice, the applicant’s letters to the Society and the Ruling of the Tribunal. From these documents, the court could discern, *inter*

alia, that the applicant had obtained more than one loan from the Society.

21. From the foregoing, this court finds that the applicant defaulted in the loan repayment. The applicant cannot cry foul when the Society seeks to realize the security offered. However, on the basis of my aforestated finding that *prima facie*, the Statutory Notice is defective, this court is inclined to grant an order of injunction as prayed but limited to the period of service of a fresh Statutory Notice to the applicant. Orders accordingly. Costs in the cause.

Dated, Signed and Delivered at Nairobi this 20th day of July, 2016

B. THURANIRA JADEN,

JUDGE