



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
HIGH COURT CIVIL NO. 131 OF 2014
KHALIL HUD AHMED.....PLAINTIFF
VERSUS
DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT
R U L I N G

1 Khalil Hud Ahmed, the plaintiff is before this court with a Notice of Motion application dated 16th October 2014. It is for an order for interlocutory injunction to issue to restrain Diamond Trust Bank Kenya Limited, the defendant, from realizing its security by auctioning plaintiffs Plot No. 14730 (C.R. 42769) Mombasa. The property was due to be auctioned on 22nd October 2014 but it did not proceed due to an interim injunction granted on 17th October 2014 in this cause. The application is premised on the grounds that the plaintiff was not served with statutory notices; he was not sent statements of account; and that the property is matrimonial property and if sold the plaintiff and his family will suffer irreparable loss.

2 I have considered the parties affidavit in support and in opposition to the application. I have also considered the authorities cited by the defendant's learned counsel.

3 The plaintiff charged his property as security for a loan facility granted by the defendant to Siyama Company Limited. Additionally the plaintiff executed a guarantee for the said facility to the tune of Ksh 17,200,000. There is no dispute that the principal debtor has defaulted in the re-payment of the loan facility.

4 Since there is that default the defendant is obligated to serve the plaintiff with 90 days notice as per Section 90 of The Land Act herein after referred to as the Act. I have perused the defendant's replying affidavit and I have sighted the Statutory Notice which is in the terms of Section 90 of that Act.

5 Since it is not disputed that there was no settlement of the loan after the 90 days notice the defendant was required to give the plaintiff another 45 days Statutory Notice in accordance with Section 96 of the Act. I have also sighted that Statutory Notice marked as "SKIO" annexed to the defendant's replying affidavit. I do however fault that 45 days notice. It fails to comply fully with the requirements of Section 96 of the Act. Section 96 requires the 45 days notice to be served on the chargor and be copied to the Commissioner and the spouse amongst others.

6 The 45 days Statutory Notice served by Garam Investments, the auctioneers, was sent to the plaintiff, and was copied to the District Commissioner. It was not sent to the plaintiff's spouse even though that

spouse gave her consent to the property being charged.

7 Because of the failure to serve the plaintiff's spouse the defendant cannot proceed with the sale of the charged property relying on the Statutory Notices so far issued in this matter. On that ground an injunction will issue. However since the only fault I find in the defendant's exercise of statutory right of sale is the failure to serve the plaintiff's spouse the injunction issued will be limited up to the period the proper Statutory Notices as per Section 90 and section 96 of The Land Act are issued by the defendant. This is keeping with the case **NATIONAL BANK OF KENYA LIMITED –VS SHIMMERS PLAZA LIMITED (2009) eKLR Viz:**

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view , the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.

8 I need to say that I find no merit in the plaintiff's claim that it has not received banks statements showing the principal debtor's indebtedness. There is no evidence that the plaintiff has requested such statements and has been denied the same.

9 Further the fact that charged property is matrimonial property is not a ground which entitles the plaintiff an injunction. It was the plaintiff who offered the property as security and now that there is default he cannot raise such an issue to defeat the defendant's right of realization. This was what the court in the case **ANDREW MURIUKI WANJOHO –VS EQUITY BUILDING SOCIETY & ANOTHER (2006) eKLR** stated:

“Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.

10 In view of the above finding I grant the following orders:

(a) An injunction is hereby issued restraining the defendants from selling, whether by auction or otherwise Plot No. 14730 (C.R.42769) Nyali Mombasa until such time the defendant shall issue Statutory Notices of sale as required under the Law.

(b) Each party shall bear their own costs of the Notice of Motion dated 16th October 2014.

Dated and delivered at Mombasa this 30th day of July 2015.

MARY KASANGO

JUDGE

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

Court

The Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE