

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 120 OF 2012

JUDITH DIPONDO 1ST PLAINTIFF

SAMMY O. NYABERA 2ND PLAINTIFF

V E R S U S

HOUSING FINANCE COMPANY LTD. RESPONDENT

R U L I N G

The application dated 22.5.2012 seeks an order of injunction to restrain the defendant from demanding from the plaintiff repayment of any money in respect of mortgage account number [particulars withheld]. The applicant is also seeking a mandatory injunction against the defendant so that the defendant provides a proper mortgage account as the mortgaged property was sold. Parties agreed to determine the application by way of written submissions.

I have gone through all the pleadings herein and it is agreed that the plaintiffs took a loan of **KShs.1,540,000/=** and offered as security plot number [particulars withheld]. The plaintiffs defaulted and the property was auctioned by Garam Investment Auctioneers on the 11.1.2012 for **KShs.1,360,000/=**. The plaintiffs were duly notified of the sale but contend that the property was valued at **KShs.2.5 million**. It is clear that after the auction the defendant sent a demand note for the balance that was due on the mortgage account.

The main issue for determination at this stage is whether the applicant has established a prima facie case with a probability of success. It is not in contention that the property has already been auctioned. The defendant is still demanding a further sum of **KShs.1,424,154.46** from the plaintiffs. The court cannot at this stage issue an order of injunction restraining the defendants from pursuing that claim. Similarly the defendant has filed its list of document which includes bank statement on the mortgage account and the sale proceeds are also included in that statement. Therefore prayer number three (3) of the application dated 22.5.2012 cannot be granted as the information is readily available. With regard to prayer number four (4) the issue as to whether the auction conducted by Garam Investments was null and void can only be determined after a full hearing and the prayer is not seeking any injunctive orders. It only seeks a declaration which ought to be made after the suit is heard and determined.

I have seen the correspondence indicating that the plaintiffs wanted to sell the property by private treaty. I have noted that Mr. Getanda Advocate wrote to the defendant on the 8.6.2010 seeking permission for his clients to be allowed to sell the property by private treaty. The request was granted vide letter dated 14.6.2010 from the defendant. Nothing happened for the whole of that year and the property was sold on 11.1.2012. This was a period of over one year and the plaintiffs cannot blame the defendant. There is no irreparable damage at this stage that will befall the plaintiffs. I do find that there is no prima facie case that has been established to warrant the grant of the prayers being sought.

In the end I do find that most of the issues being raised can only be dealt with during the hearing of the matter. The application dated 22.5.2012 lacks merit and is hereby dismissed. Costs shall follow the outcome of the main suit.

Delivered, dated and signed at Kakamega this 19th day of May 2014

SAID J. CHITEMBWE

J U D G E