



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 415 of 2012

PETER KIBOI WILLIE **PLAINTIFF/APPLICANT**

- VERSUS -

FAMILY BANK LTD. **DEFENDANT/RESPONDENT**

RULING

1. The application before the court is a **Notice of Motion** dated **27th June 2012**. It seeks as the main prayer an order that the court be pleased to grant the Plaintiff an order of injunction against the Defendant, its agents, employees, servants and/or through whoever against interfering with the Plaintiff's quiet enjoyment and use of L.R. Title No. NYANDARUA/KIRIITA MAIRO INYA BLOCK 2 (NGAINDETHIA)/54 until the hearing and determination of this application or further orders from the court.
2. The grounds in support of the application are set out therein, among them that the Defendant has instructed an auctioneer to sell the Plaintiff's property. The Plaintiff is the chargee who gave his title to secure the loan to one JACKSON MAINGI MUCHERU who passed away on **21/9/2011**, and that since the deceased borrower was insured, the bank has no basis selling the suit property.
3. The application is supported by affidavit sworn by the Plaintiff dated **27th June 2012** with its annextures.
4. The application is opposed through a Replying Affidavit.
5. The Defendant Bank advanced the sum of **Kshs.1,000,000** to one Jackson Maingi Mucheru ("**the borrower**") to finance working capital vide loan facility offer letter dated **13th November 2009**. The said loan amount was secured by registering a legal charge over the Plaintiff's property title number; Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindethia)/54.
6. The borrower subsequently defaulted in making repayments for the said amount whereupon the Defendant sent a formal letter of demand on **4th July 2011** requiring immediate repayment of **Kshs.688,834.10** being the amount owing to the Defendant as at **30th June 2011**. The said demand letter was also copied to the Plaintiff herein.
7. The said borrower failed to satisfy the loan amount and at the time of the borrower's demise on **21st September 2011** the loan had not been serviced regularly and sufficiently since the month of **May, 2011**. The Defendant served upon the Plaintiff the mandatory notice of intention to exercise its statutory

power of sale and after lapse of the stipulated **45 days**, the Defendant appointed M/s Jogi Auctioneers to effect the sale of the charged property by public auction to recover the loan amount. The said firm proceeded to serve the **45 days** redemption notice and notification of sale respectively upon the Plaintiff herein and further placed an advertisement for the sale of the charged property by public auction in the local daily newspapers.

8. Parties with the leave of the court agreed to file written submissions in respect of the applications. The Applicants filed their submissions on **10th August 2012** while the Respondents did the same on **21st September 2012**.

9. I have carefully considered the application in the light of opposing submissions. The Applicant has raised issues among them that the Respondent did not give a proper statutory notice, and that in any event, the purported address used of **P.O. BOX 1000 NYAHURURU** did not belong to the Applicant. The Applicant further alleged that the deceased borrower had been insured - in this regard deceased Life Insurance and not the insurance of the suit property. If that is correct, then obviously the bank should seek to enforce that insurance. However the bank has not admitted this allegation.

10. In my view, the matter before the court raises weighty issues which must be determined on their merits. The fact that the borrower died alone leaves behind unresolved issues which need to be determined before the bank can exercise its statutory power of sale. In that event, there needs to be clear, unequivocal evidence that the bank informed the chargor of every step it intended to take in the exercise of that power of sale. Further, for the last several years it has become a standard banking practice that all borrowers of loan must have life insurance. Upon such a borrower dying, the insurance will be called upon to pay the balance of the loan. The Defendant in this matter alleges that only the suit property ought to have been insured by the Plaintiff himself as per the charge. In my view, whether or not the loan was insured is material, the proof of which may completely change the direction in this suit. The better view to be taken by this court is that of restrain i.e. that it is better to preserve the suit property, and determine all the issues in a fair trial. In my view the Plaintiff, as the owner of the suit property, stands to suffer irreparable damages if the suit property is sold at this stage. In light of the principles established in **Giella – Vs – Cassman Brown** I am satisfied that the Plaintiff is entitled to an injunction pending the hearing and the determination of this suit.

9. In the upshot I allow the Notice of Motion application dated **27th June 2012** as prayed with costs in the cause.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Kuria H/B for Wambugu for the Plaintiff /Applicant
Maina H/B Maluki for the Defendant/ Respondent
Teresia – Court Clerk