



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 189 OF 2010

CONNIE FRANCIS OWALA PLAINTIFF
-VERSUS-

NATIONAL BANK OF KENYA LTDDEFENDANT

RULING

1. The application before court is a chamber summons dated 6th December, 2010 brought pursuant to Sections 1A, 1B, 3A of the Civil Procedure Act, Order XXXIX Rules 1, 2, 3 & 9 of the Civil Procedure Rules seeking for the following prayers.

- i) This application be certified as urgent and be heard ex-arte in the first instance.
- ii) Pending the hearing and determination of this suit a temporary order of injunction be issued restraining the defendant whether by acting by itself, its agents, servants or any of them from advertising or offering for sale or disposing by public auction or in any other manner interfering with the deceased estate's ownership and use of land Parcel No. KAMAGAMBO/KANYAWANGA/563.
- iii) At the ex parte hearing hereof, interim orders in terms of prayer 2 above be granted pending the hearing and determination of this application.
- iv) The costs of this application be awarded to the plaintiff/applicant."

2. The application is supported by the affidavit of **Connie Francis C. O. Owala** the applicant and based on the grounds that the respondent intends to sell Parcel No. **KAMAGAMBO/KANYAWANGA/563** by public auction without issuing a notice as required by Section 74 of the R.L.A; the charge document did not provide for the rate of interest; no consideration passed between the parties; the estate of the deceased proprietor of the suit property is likely to suffer irreparable loss; the same is then ancestral land.

3. The respondent objected to the application vide the replying affidavit of **ALICE OKWAR** dated the 27th of January, 2011. The gist of the opposition is that the plaintiff was offered financial facility that was secured by the property subject matter herein; the plaintiff defaulted in servicing the loan which she acknowledged through her letters, the debt has accumulated interest and the total amount was Kshs 3,117,145 as at 15.6.2004; a statutory notice was issued on the 15th of June, 2004, a 45 days notice of redemption also issued on 16th November, 2010; the application lacks merit and ought to be dismissed.

4. The parties have both annexed the security document. Paragraph 2b of the same provides for repayment of principal debt, together with interest to be charged by the lender from time to time and the lender need not inform the chargor of any charged in the rate of interest payable. It therefore follows that the interest rate charge is at the discretion of the lender and it need not advise the chargor, secondly the applicant acknowledged the debt vide letters dated 26th May, 1992, 9th October, 1992 and 21st June 1993, the 45 days redemption notice sent to Box 100 Rongo and served at the premises.

5. The applicant's claim is that no statutory notice was issued. Although various correspondences were exchanged it is not clear that a statutory notice was issued as required by S. 74 of Cap 300.

6. In view of the fact that no proof of service of the statutory notice was made available I find that the applicant has on this score a prima facie case with a probability of success. Should the bank issue a notice as prescribed by law the other reasons espoused by the applicant will be of no consequence.

7. The application therefore succeeds only to the extent that there is no proof that a statutory notice was served.

Costs in the cause.

DATED AND DELIVERED THIS 16TH DAY OF FEBRUARY, 2012.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Appellant

.....present for Respondent