



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 56 OF 2006

PHYLIS JEROTICH KIMUTAI

HENRY KIPKORIR KIMUTAI

(Suing as personal representatives of the Estate

of Jeremiah Cheuiyot Kimutai).....
PLAINTIFFS

VERSUS

KENINDIA ASSURANCE CO. LTD.....DEFENDANT

RULING

The application dated 3/3/2005 seeks one order, that a temporary injunction do issue against the defendants, their servants or agents to restrain them from disposing off or alienating all that parcel of land known as Nakuru/Municipality Block 11/125 registered in the name of the deceased, Jeremiah Cheruiyot Kimutai which was scheduled for sale by way of public auction on 15/3/2006. The grounds upon which the application is brought are that:-

1. **The defendant/respondent never gave the applicant the 90 days notification of sale and that the proposed sale is made in bad faith and calculated to delay the equity of redemption;**

2. **That the recovery of the principal sum and interest is barred by Section 19(1) of the Limitation of Actions Act Cap 22 Laws of Kenya;**

3. **That the amount sought to be recovered includes interest whose recovery is barred by Section 19(4) of the Limitation of actions Act;**

4. **That the interest is sought to be recovered in contravention of Section 44 of the Banking Act Cap 411 Laws of Kenya;**

5. **That variations in interest have been made contrary to Section 71 of the Registered Land Act.**

The application was supported by the affidavit of Henry Kipkorir Kimutai, one of the administrators of the deceased's estate. The respondent strenuously opposed the application and a replying affidavit was sworn by Praful Damji, Senior Assistant General Manager with Kenindia Assurance Co. Ltd with several annexures thereto.

The applicant does not deny that the deceased obtained a loan from the defendant with which he secured the land Nakuru/Municipality Block 11/125. the applicant averred that the documents found after the deceased's death revealed that the deceased had paid Kshs.1,184,485/- as of 8/8/2001; that the respondent compounded the interest and increased it to 22.5% without the Minister's approval in accordance with the **Banking Act**, (SM); that in the charge, the Bank charged a higher interest rate of 20% instead of 16.5% allowed under the law.

The Respondents in opposing the application, maintained that the parties agreed on the terms of the charge which are binding on them as to the interest rate chargeable and that was no variation that required the Minister's permission; that **Section 19** of the **Limitation of Actions Act** does not apply because the respondent has not filed any suit against the applicant; that proper notice was issued by a licenced auctioneer vide the letter of 12/2/06, no action was taken for 6 years and notification of sale was issued on 12/1/06; that it was not necessary to issue subsequent notices once the first one was issued and it was enough if an advert was made; that there had been 4 previous attempts to sell the property but the deceased would make proposals to pay but he never honoured them. It is also contended that the applicant has come to court with unclean hands and is guilty of material non disclosure; the respondent also drew the court's attention to HCC 464/1999 filed by the deceased against the respondent where similar orders were sought and the suit is still pending. The respondent urged that the applicants have not met the threshold required for the grant of injunction as espoused in the case of **Giella V Cassman Brown & Co. (1973)EA 358** because balance of convenience tilts in favour of the respondent who lent the deceased money which has not been paid for all these years, despite promises to do so.

From the material placed before the court, the applicants do not seem to deny that the deceased only paid part of the loan and as at the time of his death, it was still outstanding. What they dispute is rate interest.

Whether the statutory notice was served;

I have considered the affidavits, annexures thereto and rival submissions. I will first consider whether the notice was served. The statutory notice is said to be dated 12/1/06. The applicant claims to have received it on 26/1/06. Since there is no evidence of how the notice was delivered and it is not denied that it was received, I take the date of service of the notice to be the date of receipt, that is 26/1/06. The notice indicates that the sale would be on 15/3/06 if the sums were not paid. The notice indicated that the respondent had 45 days upto 28/2/06 within which to pay. It is worth noting that from the date of service of the notice, on 26/1/06 to 28/2/06, was only about 32 days. **Section 74** of the **Registered Land Act** provides as follows:-

“S.74

(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or on the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the charger notice in writing to pay the money owing to perform and observe the agreement, as the case may be.

(2) If the charger does not comply within three months of the date of service, with a notice served on him under sub-section (1), the chargee may

(a) appoint a receiver of the income of the charged property or

(b) sell the charged property.”

The period of time allowed for the statutory notice is three months (90 days). The excuse that the respondent gives for the short notice is that they had served another notice earlier, and that 90 days notice was not necessary. The respondent's counsel referred the court to a notice issued to J. K. Cheruiyot dated 12/1/2001, by registered post to Box 31163 giving him notice to pay or that they would appoint a receiver manager or sell the property. The stamp on the document is not clear. It is the same address through which the notice of 12/1/06 was issued. It is evident from the respondent's affidavit and annexures that there had existed threats of sale of this land since 2001 with the deceased making proposals that he never fulfilled. The land was never sold.

By the time the notice dated 12/1/06 was issued, Jeremiah Kimutai cheruiyot was long deceased – 4½ years earlier, yet it is to him that the notice was addressed. The question is whether the dead can be served with such notice. In **Ragui I V Barclays Bank of Kenya Ltd (2002)1 KLR 647**, J. Ringera held that a statutory notice addressed to a deceased person is invalid and has no effect and that it should have been

served on the administrator. I do agree with that view.

The respondents relied on the case of **Kyangavo V KCB Ltd, HCC 428/2001** where J. Njagi held that a notification of sale need not be given every time a sale aborts but there has to be an advertisement done afresh any time fresh instructions are received by an auctioneer. I would find it hard to agree with the above proposition for the reason that in this case, the first statutory notice had been issued to the deceased on 25/5/1992 (PD3) after which the deceased made many proposals but did not pay up. The respondent contends that several notices were issued to the applicant including the one of 12/1/06. The court was not shown the notices that were sent to the deceased. If they are like the one dated 12/1/06, then they were all invalid. Besides by the time the notice of 12/1/06 was sent the deceased was long dead and it is the administrators who were supposed to be served with notice. The respondent could not be heard to rely on the earlier notices sent to the deceased. That is why the **Kyangavo** case (supra) would not apply to this case. The respondent wishes to exercise that statutory right of sale. If involves land i.e. flats and I do find that the applicants have made out an arguable case with probability of success. If the order is not granted the flats may be sold and put beyond the applicants' reach by the time this suit is heard.

The applicants also complain that the notice was defective in that it did not conform to **Section 74** of the **Registered Land Act**. I have seen the notice and it did not give the applicants 3 months or 45 days redemption notice, nor did it state that if the chargor defaulted, the chargee would appoint a receiver of the income of the charged property or sell the property. I find that the notice dated 12/1/06 raises questions of its validity.

The applicant also alleged that the charge is defective because it made illegal charges on interest rates and was not validly executed as required by **Section 109 2(b)** of the **Registered Land Act**. These are substantive issues to be determined at the main hearing. I say so because if **Section 109 2(b)** had not been complied with, why did the deceased see it fit to start paying the loan. It will be determined whether the applicants can now rely on a technicality to deny their obligations under the charge instrument. It is trite law that a dispute as to the exact amount owed under a charge is not a ground for restraining a lender from exercising its statutory power of sale. The issue of interest would not be a bar to the sale had proper notice been issued.

It is worth noting that this matter has been pending since 2006. The loan was taken way back in 1991 and the chargor defaulted in payment way back in 1992. Even though I have found that the proper notice was not sent to the applicants as required by the law, the applicants are not completely innocent. It was admitted that the loan was obtained and is outstanding as per the accounts taken by their agent, IRAC. For that reason, I will allow the application for interim orders but on terms, that the applicants will be serious with the prosecution of this suit and set it down for hearing as soon as possible. In the result, I grant prayer 3 of the chamber summons dated 3/3/2005 on condition that the applicants deposit Kenyan Shillings Four Million (Kshs.4,000,000/-) in a joint interest earning account, of their counsel and that of the respondent, within 30 days of this ruling, failing which the applicants' chamber summons stands dismissed with costs. Otherwise, the costs of the application will abide the determination of the suit.

DATED and DELIVERED this 23rd day of March, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Weda for the applicants/plaintiffs

N/A for the respondent/defendant

Kennedy – Court Clerk