



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 115 OF 2012**

**ABDULKADIR SHARIFF ABDIRAHIM .....PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED .....1<sup>ST</sup> DEFENDANT**

**WATTS ENTERPRISES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff's application dated 8<sup>th</sup> February, 2012 seeks the following orders:

**"1. THAT this application be certified urgent in the first instance and for reasons to be recorded its service be dispensed with and it be heard ex parte.**

**2. THAT a temporary injunction do issue restraining the Defendants, either by themselves, jointly or any of them, their servants agents auctioneers or any of them or otherwise howsoever or any person claiming title through them from transferring/selling or in any way interfering with the plaintiffs quiet possession enjoyment and occupation of L.R. Numbers 209/11067/7 and L.R. NUMBER 209/11067/22 until this suit is heard and determined.**

**3. THAT the defendants whether by themselves either jointly or any of them, their servants, agents, advocates or auctioneers or any of them howsoever be restrained by temporary injunction from doing the following acts or any of them that is to say from advertising for sale, disposing or selling by Public Auction, private treaty at any time completing by otherwise howsoever interfering with the plaintiffs occupation and ownership in those parcels of land known as L.R. Numbers 209/11067/7 and L.R. Number 209/11067/22.**

**4. THAT an order be made under Section 52 of the Indian Transfer of Property (Amendment) Act 1989 that during the pendency of this suit THAT ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing allotment, user of possession or in any kind of right or interest in ALL THOSE PARCELS of land known as .R. Numbers 209/11067/7 and L.R. Number 209/11067/22.**

**5. THAT the plaintiff be at liberty to apply for such further or other orders and or directions as this Honourable Court may deem fit and just to grant.**

**6. THAT costs of and occasioned by this application be borne by the defendants."**

2. The application was supported by an affidavit sworn by **Abdulkadir Shariff Abdirahim**, the plaintiff.

3. The plaintiff deposed, *inter alia*, that:

- He is the registered owner of two parcels of land known as **L.R. Nos. 20911067/7** and **209/11067/22**, hereinafter referred to as “**the suit property**”.

- There are charges created in favour of the 1<sup>st</sup> defendant to secure facilities granted to a company known as Sasa General Investments Limited, hereinafter referred to as “**the Borrower**”.

- The Borrower has defaulted in its obligations to the 1<sup>st</sup> defendant.

- The 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to realize its security.

- The 2<sup>nd</sup> defendant served a 45 days’ notice of sale but the 1<sup>st</sup> defendant had not served any statutory notice.

- The 2<sup>nd</sup> defendant has already advertised the suit property for sale while there is a pending matter in the Court of Appeal between the parties in which the plaintiff is objecting to the sale of the other securities charged to the 1<sup>st</sup> defendant.

- The plaintiff is making effort to sell the other property charged to the 1<sup>st</sup> defendant so as to salvage the suit property.

- That the defendants are acting contrary to the law and ought to be stopped from selling the suit property.

4. The 1<sup>st</sup> defendant filed a replying affidavit that was sworn by **Violet Monari**, a Credit Analyst Officer. She stated that the Bank had on 11<sup>th</sup> July, 2011 served a valid statutory notice upon the plaintiff, a copy whereof was annexed to the replying affidavit and marked as VM 2.

5. The 1<sup>st</sup> defendant denied that it was engaged with the plaintiff in any appellate matter over any properties.

6. The 1<sup>st</sup> defendant added that it was lawfully entitled to exercise its statutory power of sale of the suit property since the Borrower had defaulted in servicing the banking facility and a valid statutory notice had been served.

7. On 9<sup>th</sup> February, 2012 Mwilu J. granted ex parte injunctive orders restraining the defendants from selling the suit properties until the application is heard inter partes on 23<sup>rd</sup> February, 2012. Come that day, the matter was transferred from the Environmental and Lands Division to this Division and the interim orders were extended until the application is heard and determined.

8. On 19<sup>th</sup> March, 2012 it was agreed by consent that the plaintiff’s application would be determined by way of written submissions. The plaintiff was to file his submissions within seven days from the said date and the defendants to file theirs within seven days from the date of service of the plaintiff’s submissions.

9. As at 11<sup>th</sup> April, 2012 when the defendants filed their submissions, the plaintiff had not filed his submissions.

10. I have carefully perused the affidavits on record as well as the defendant's submissions.
11. The gravamen of the plaintiff's application is that he was not served with a statutory notice by the 1<sup>st</sup> defendant before it proceeded to instruct the 2<sup>nd</sup> defendant to sell the suit property.
12. However, at pages 96 to 99 of the replying affidavit copies of statutory notices that were sent to both the plaintiff and the Borrower under certificate of postage are exhibited. The postal address indicated on the statutory notices is the one that is contained in the various charge documents. I therefore find and hold that the plaintiff was duly served with a valid statutory notice as required under the law.
13. It is not disputed that the Borrower is in arrears of its loan repayments to the 1<sup>st</sup> defendant. The court has established that an appropriate statutory notice was served upon the plaintiff and upon its expiry the 2<sup>nd</sup> defendant served the 45 days' notice of sale of the suit property. In the circumstances, the plaintiff has not made out a *prima facie* case with a likelihood of success.
14. It matters not whether the suit property is a residential house where the plaintiff and his family members have been living for many years. As long as it was properly charged to the 1<sup>st</sup> defendant and the Borrower has breached the terms of the lending and the lender has given the plaintiff as well as the Borrower appropriate notices, the Bank is perfectly entitled to exercise its statutory power of sale.
15. In **MARTHA KHAYANGA SIMIYU v HOUSING FINANCE COMPANY OF KENYA & OTHERS** [2001] 2 EA 540, Ringera, J.(as he then was), held that once a property has been charged to secure financial accommodation it *ipso facto* becomes a commodity for sale in the event of default in payment of the debt secured.
16. I carefully perused the annexures to the plaintiff's affidavit and I did not come across any order issued by the Court of Appeal to restrain the 1<sup>st</sup> defendant from selling the suit property.
17. In my view, the plaintiff obtained the ex parte orders fraudulently by falsely stating that the 1<sup>st</sup> defendant had not served him with a statutory notice and that the notice that was served by the 2<sup>nd</sup> defendant was defective, which is not the case.
18. In the circumstances, the plaintiff's application dated 8<sup>th</sup> February, 2012 is dismissed with costs to the defendants.
19. Needless to state, the interim orders restraining the defendants from selling the suit property are hereby vacated.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL, 2012.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Alex/Muriithi – Court Clerks**

**Mr. Onindo for Mrs. Mwenesi for the Plaintiff**

**Mr. Luseno for the Defendant**