



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 509 of 2011

JAMES VICTOR ONSONGO.....PLAINTIFF

VS.

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 16th November 2011 through which the Plaintiff/Applicant seeks an interlocutory injunction restraining the Defendant from selling his property L.R. No. Kajiado/Kaputiei North/25715. The application is brought under Order 40 Rule 1,2,4, and 10 of the Civil Procedure Rules and Sections 3, 3A, 1A and 1B of the Civil Procedure Act.
2. The application is based on grounds set out in the face of the application and is further supported by the Plaintiff's affidavit sworn on 16th November 2011. The salient grounds in support of the application are that no statutory notice nor notification of sale were served upon the Plaintiff; substantial payments have been made to the defendant to warrant redemption of the mortgage; the Plaintiff's entire family resides in the suit property in which they have a sentimental attachment and the interest charged by the Defendant is illegal. The Applicant further states that he was summarily dismissed from his employment with the Defendant hence his inability to repay loan.
3. In opposition to the application, there is a replying affidavit sworn on behalf of the Defendant by Purity Kinyanjui on 14th December 2011 and filed in court on the same day. Through the affidavit, the Defendant, inter alia, refutes the Plaintiff's claim that no notices of sale were issued to him and confirms that all requisite notices were issued to the Plaintiff, including the statutory power of sale.
4. Counsel for both parties filed written submissions to bolster their rival positions in relation to the application before me.
5. I have carefully evaluated the application on the basis of the material placed before me and on the basis of the rival submissions by counsel for the parties.

6. The principles for the grant of injunction orders were well stated in the case of **Giellavscassman Brown (1973) EA pg. 358** by Spry V.P. as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

7. In the application before the court, the grounds that no statutory notice or notification of sale were served have been sufficiently controverted in the replying affidavit of Purity Kinyanjui which averments the Plaintiff has not contested. I am therefore satisfied that the Defendant has complied with the statutory prerequisites for exercise of statutory power of sale.

8. With regard to the contention by the Plaintiff that the rate of interest charged applied to the house loan after he ceased to be an employee contravenes the terms of the facility, it is common knowledge that the rate extended by employers to employees are not market rates and are concessioned as a matter of staff benefits. Once the employer-employee relationship ceases, the benefit of concessioned staff rate ceases and market rates of interest take effect. In the present case, the position was well stipulated in the letter of offer of facilities dated 1st December 2008 which is one of the documents filed by the Plaintiff on 16th November 2011 alongside the Plaintiff and which is also annexed to the replying affidavit of Purity Kinyanjui. Clause 4 of the said letter states:

"Should you leave the employment of Equity Bank Limited, the interest will be charged at the prevailing commercial rate without prior notice to the Borrower"

9. It is therefore clear that the market interest rate applied by the Defendant upon termination of employment is within the contractual framework of the letter of offer of facilities and cannot be construed to be an illegality warranting grant of injunction orders. In any event, it is trite law that the exercise of statutory power cannot be impeded by a dispute as to the amount due or the interest rate applicable (See ***Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125***). This authority further answers the Plaintiff's claim that he had made substantial payment to the defendant hence redemption of the mortgage is not warranted.

10. On the contention that the Plaintiff's entire family resides in the suit property in which they have acquired a sentimental attachment, my take is that the Plaintiff was fully conscious of the consequences of default to the title, which, in any event, was acquired with full financing of the Defendant. By offering the property as security for the loan facility, the property became a commercial commodity open to the vagaries of the market place and was fully compromised in any shade of sentimental value or pride that may have hitherto attached to it from the standpoint of the chargor and his family.

11. Finally, the issue of dismissal of the debtor from the Defendant's employment and the debtor's consequent inability to service the loan cannot found a basis for grant of injunction orders as that inability to pay is itself a strong basis for the exercise of the chargee's statutory power of sale.

12. For the above reasons, I am persuaded that the Plaintiff/Applicant has not made a prima facie case for grant of injunction orders. The upshot is that the Plaintiff/Applicant's Notice of Motion dated 16th November 2011 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF JUNE 2012.

J.M. MUTAVA
JUDGE

