



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Civil Case 86 of 2008

**JOHN TOM JUMA PLAINTIFF/APPLICANT
VERSUS**

1. CO-OPERATIVE BANK OF KENYA LTD.

2. GARAM INVESTMENTS LTD..... DEFENDANTS/RESPONDENTS

RULING

The application by way of Notice of Motion dated 4th February 2011 seeks orders that the *ex parte* orders made on the 11th October 2010 be set aside and that the plaintiffs case be reinstated.

The application is based on the grounds stated in the body of the application and is supported by the affidavit of JOHN TOM JUMA, the plaintiff/applicant.

The applicant has averred that he was indisposed on 11th October 2010 when the case was dismissed for non attendance. The applicant has also averred that his counsel had several matters in other courts and requested a colleague to hold brief for him but the case was called out in court while counsel holding brief was still chasing the same file at the registry.

The application was opposed to as per the replying affidavit by Ochoro Kebira, counsel for the defendants/respondents. The said counsel saw no merits in the application and also blamed the applicants as being guilty of laches as no application for reinstatement of the suit was made until about five months later.

I have perused the records. It is noted both the plaintiff and his advocate were not present when the suit was dismissed. Although the plaintiff states that he was unwell, he cannot vouch on what transpired in court and why his advocate was not present. There was also delay in filing the application for reinstatement. After the application for reinstatement was filed, it does not appear to have been prosecuted expeditiously. Be as it may, this court is not inclined to visit the mistakes of the counsel on the litigant. Any prejudice occasioned to the defendants can also be compensated by way of costs. Consequently I allow the application with “throw away” costs to the defendants/respondents.

The Notice of Motion dated 23rd May 2011 seeks an order of temporary injunction restraining the

defendants/respondents from selling land parcel No. North Wang'a/Kholera/1904. In execution of the 1st defendant's power of sale pending the hearing and determination of the suit.

The application is premised on the grounds stated in the application and is supported by the affidavit of John Tom Juma, the plaintiff/applicant. In the said affidavit, the applicant asserts that the said property was advertised for sale by public auction when he had not been served with a statutory notice of sale. The applicant concedes that he has only paid Kshs.300,000/= out of the principal sum of Kshs.800,000/=.

The application is opposed to as per the replying affidavit of Milton Kweya, an employee of the 1st defendant/respondent. In the said affidavit, the defendant's bank asserts that the applicant defaulted in the payment of the installments. That the loan was repayable within 36 months but five years down the line the applicant has not even paid half of the principal sum.

The Respondent bank's position is that the applicant was issued with demands and notifications bringing to his attention the default and breach and eventually a statutory notice when the applicant failed to accede to the demands.

The statutory notice is annexed in the replying affidavit (annexture 5a). The same was sent by registered post as per the certificate of registration annexed.

There is no supplementary affidavit denying the averments made on behalf of the bank relating to the issuance of the statutory notice. The applicant has also conceded to having paid the sum of Kshs.300,000/= only out of the total sum of Kshs.800,000/= advanced. The applicant has made no mention of the interest and neither has he refuted the interest stated by the bank or the bank's claims on the amount owing.

The applicant has failed to establish a prima facie case. The applicant's case does not meet the requirements set out in the case of *Giella vs. Cassmsn Brown [1973] E.A. 358* for granting a temporary injunction.

I however note the subject matter of the suit is land which is an emotive subject. According to the plaintiff his family and matrimonial home stands on the said land. The plaintiff would suffer irreparable loss if the auction proceeds. On the other hand the loan remains unpaid to a large extent.

This court is in the premise inclined to grant the injunction on the condition that the plaintiff/applicant do deposit the sum of Kshs600,000/= in court or in an interest earning joint account of the advocates herein within fourteen (14) days from the date hereof. In default the auction to proceed.

Delivered, dated and signed at Kakamega this 6th day of June, 2012

J. THURANIRA
J U D G E