



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Case 87 of 2012

SAMUEL OTIENO OKELLOPLINTIFF / APPLICANT

VERSUS

K-REP BANK LIMITEDDEFENDANT / RESPONDENT

RULING

The plaintiff / Applicant's application dated 14th May 2012 prays for the following orders:-

- 1. Service of this application be dispensed with in the first instance owing to the urgency disclosed on the affidavit in support of this application together with the certificate of urgency annexed hereto.**
- 2. An interim order of temporary injunction do issue ex-parte in the first instance restraining the defendant whether by itself, its servants and / or agents or anyone acting under its instruction from selling, alienating, auctioning or in any way disposing of the property registered as West Kasipul / Konyango Kokal / 1596 pending the hearing and final determination of this application.**
- 3. An order of temporary injunction do issue restraining the defendant whether by itself, its servants and / or agents or anyone acting under its instruction from selling, alienating, auctioning or in any way disposing of the property registered as West Kasipul / Konyango Kokal / 1596 pending the hearing and final determination off this suit.**

The same is supported by his affidavit sworn on 14th May 2012. According to the applicant, he took a loan facility of Kshs. 800,000/= as well as an overdraft facility of Kshs. 500,000/= from the defendant sometimes in the year 2007 and give land parcel number West /Kasipul / Konyango Kokal / 1596 as a collateral.

The plaintiff / applicant continued to pay the loan but felt into arrears. The application has been opposed by the defendant. Courtesy of the replying affidavit of one Jeremy Nyaga Imanene.

From the evidence on record and the submission by the counsels' from both parties, there is no dispute that the loan facility was never allowed to the applicant. It is further clear that the applicant felt into arrears, which he admits.

The defendant on 16th June 2011 issued the three (3) months statutory notice. The applicant failed to honour and on 21st September 2011 the defendant through **M/s Garam Investment Auctioneers** issued a forty five (45) days notice. The amount outstanding by then was Kshs. 1,212,840.91/=

The sale was to take place on 24th November 2011. However, the applicant filed suit number Winam **SPMCC Number 271 of 2011** and obtained some temporary orders. This of course forestall the intended sale. Subsequently, the applicant withdrew the suit.

The defendant on 4th May 2012 through M/s Garam Investment gave fourteen (14) days notice to the applicant to pay up or again sell the security, namely **West / Kasipul / Konyango Kokal/ 1596**. The said auction was to take place on 21st May 2012. This necessitated the filling of this suit and the application for temporary injunction.

The issue raised by the applicant is the question of notice by the Auctioneers. The applicant counsel contended that the applicant was not given adequate or sufficient notice as provided under Section 74 of the Registered Land Act Chapter 300 Laws of Kenya.

The applicant has further argued that the respondent has failed to produce the details of the balance of the bank loan and that there has been total lack of co-operation from the defendant / respondent.

Mr. Ogejo for the applicant argued therefore that the notice given was only for two (2) days and indeed was unreasonable.

This issue of notice is well clear under Rule 15 (d) of the Auctioneer Act Chapter 526 of the Laws of Kenya which states :-

“15 – Upon receipt of a court warrant or letter of instructions the auctioneer shall in the case of immovable property

(d) Give in writing to the owner of the property a notice of not less than forty five (45) days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction”.

(e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen (14) days after the first newspaper advertisement”.

From the above quotation it is expected that fourteen (14) days after the first advertisement which in this case was 7th May 2012 the defendant was enjoined to sale by Public Auction the charged security.

My understanding therefore is that when the sale was frustrated by the Order of the lower court as earlier own alluded, the defendant was bound to advertise the sale. This it did on 7th May 2012.

Was the defendants auction therefore wrong?. Was the notice superfluous? My answer is on the negative. The defendant did not breach the Rules. Moreover the letter dated 4th May 2012 was served upon him by Registered Post which was his last known address a fact which he has not denied.

Further I do not find that the applicant has come to this court with clean hands. I have carefully examined the pleadings in the Winam case earlier own alluded above. Although the applicants counsel argued that it was filed by the applicant in person and did not understand that the said court did not have jurisdiction, I beg to disagree. The said case was tactfully filed to defeat the expected auction. In fact the certificate of urgency dated 22nd November 2011 was drawn by the law firm of Olel Onyango and Ingutia Advocates.

The parties have argued that I should rely on the nor famous case of **Giella =vs= Cassman Brown & Co Ltd E. A. 1973 EA 358**. I shall fully rely on the same and find that the same does not support the applicant’s case. I do not see any damage the plaintiff stands to suffer. All the notices apparently reached him. He has not denied that he is in arrears. Finally, I am persuaded that the defendant can pay the applicant any damages that he may incur.

For the above reason I shall disallow the plaintiff / applicant's application. The defendant shall have the costs.

Dated, signed and delivered at Kisumu this 25th day of July 2012

H. K. CHEMITEI

JUDGE