



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Miscellaneous Application 270 of 2011

EUNICE KAVINDU KIOKO..... PLAINTIFFS/APPLICANTS

SAMMY KIOKO MBONDO PLAINTIFFS/APPLICANTS

VERSUS

KENYA COMMERCIAL BANK LIMITED DEFENDANT/RESPONDENT

R U L I N G

Before me is an application by way of Chamber Summons dated 8th September 2009 filed by Eunice Kavindu Kioko and Sammy Kioko Mbondo. The application was filed under Order XXXIX Rule 1, 2, 2A, 3 & 9 and Order L of the Civil Procedure Rules and Section 3A, 63 (c) & (e) of the Civil Procedure Act (Cap 21). The prayers in the application are that:-

- a. The application be certified urgent and heard *ex-parte* in the first instance and that service be dispensed with.**
- b. This Honourable court be pleased to issue temporary injunction restraining the defendant either by itself or its agents from selling by way of public auction, alienating, advertising for sale, or in any manner disposing of the plaintiffs' property known as LR No. Machakos/Kiandani/3209 until the hearing and determination of this application and suit.**
- c. The Honourable court be pleased to order the respondent to take (sic) accounts of the plaintiffs' loan account.**
- d. This Honourable court be pleased to grant any other relief it may deem fit to grant.**
- e. Costs of the application be provided for.**

The application has grounds on the face of the Chamber Summons, that the respondent had through auctioneers advertised the plaintiffs' above property for public auction; that no statutory notice as required under section 74 of the Registered Land Act (Cap 300) or section 65(2) of the said Act, had been given; that no notice had been given to the District Commissioner Machakos District as required under section 77(6) of the Registered Land Act.

The application was filed with an affidavit sworn by one of the plaintiff/applicants, Eunice Kavindu Kioko. It was deponed, *inter alia*, that the property in question was the matrimonial home of the deponent and her husband (the 2nd plaintiff), that she worked with the defendant, Kenya Commercial Bank Ltd, until 2004 when her services were terminated on allegations of theft; that in 2007 she was granted a loan

for Kshs.1,100,000/= and later a car loan of Kshs.700,000/= by the defendant as an employee; that she was charged with theft in court but was later acquitted and intended to pursue a claim for malicious prosecution against the defendant; that no statutory notices had been served as required by law; that in spite of the absence of service of statutory notices, the defendant had caused an advertisement to be made for the sale of the property by public auction; that her attempts to sort out the issue with one Mr Kasyoka, the defendant's Credit Support Manager had not succeeded, as the said Mr Kasyoka, had refused to attend to her.

The application is opposed. A replying affidavit sworn on 30th December 2010 by Isaac Njoroge, the Legal Manager of the defendant was filed. It was deponed in the said affidavit *inter alia* that the 1st plaintiff/applicant, Eunice Kioko in December 2006 (should be 1996) secured a loan of Kshs.1,100,000/= and later Kshs.700,000/= and duly executed a charge; that between the years 2004 and 2009 she defaulted in repaying the balance and several letters were issued to her; that she admitted in writing by letters dated 8th April 2008, and 11th December 2008 that she had defaulted in paying the money; that requisite notices under the Registered Land Act were issued to her and the District Commissioner Machakos; that as a consequence of the default and the expiry of the statutory notice period, the defendant advertised the property for sale through auctioneers; that the amount owing was Kshs.2,112,730.04 plus accrued interest; that the 1st plaintiff had been lying on oath and therefore did not come to court with clean hands; that the plaintiffs had not established the threshold for the grant of interlocutory injunctions.

Parties through their advocates, filed written submissions to the application. The Plaintiffs' written submissions were filed on 26th October 2011, and those for the defendant were filed on 12th October 2011. I have perused the said submissions and authorities cited. Counsel who appeared in court, Mr Mutuku for the plaintiff, and Mr Mutia for the defendant, relied upon the written submissions filed.

I will state at the outset that prayer 1 of the application has been spent. In addition, interim injunction was granted before the application was heard *inter partes*.

The defendant claims to have served statutory notices. Their affidavit sworn on 30th December 2010, purports to annex the said notices as "IN4" and "IN5". No such copies of notices are however annexed to the said affidavit. What is annexed therein is only the charge document "IN1". It is the contention of the plaintiffs that no such statutory notices were issued and served. In those circumstances, and in the absence of the statutory notices served, I am inclined to find that the plaintiffs have demonstrated a *prima facie* case with probability of success.

On irreparable loss, land especially land on which someone is living as a home, is not easy to be reduced into the form of quantifiable damages. Besides, the defendant seems to think that the value of the land is the same as the value of the outstanding credit. It is not. The outstanding credit is the loan or amount due to the defendant and not the value of the land and its developments. None of the parties have provided a commercial valuation of the land. At this preliminary stage, I find that, if the land property is auctioned, the plaintiffs are likely to suffer irreparable loss not quantifiable in the form of damages.

The balance of convenience is also in favour of the plaintiffs, as they are on the land, and there is no allegation that they might dispose of the land. Considering all the above, I am of the view that the requirements for the grant of an interlocutory injunction enunciated in ***Giella –vs- Cassman Brown (1973) EA 358*** have been satisfied by the plaintiffs/applicants herein. I will grant temporary injunction pending determination of the case.

However, in my view, such an injunction should never be an instrument to be in effect for eternity. I will therefore grant the injunction provided the plaintiffs ensure that the case is fixed for hearing by next year (2013).

I also find justification for ordering the respondent to give the plaintiffs the loan account before the suit is heard. The commercial relationship demands so.

Consequently, I allow the application and order as follows:-

- 1. I grant prayer (b) till the hearing of the case, provided the plaintiffs fix a hearing date for the case latest by next year (2013).**
- 2. The defendant will provide the plaintiffs with an account of the loan account before the hearing of the case.**
- 3. Costs in the cause.**

Dated and delivered at Machakos this 23rd day of July 2012.

George Dulu
Judge

In presence of:-

Nyalo – Court clerk

N/A for Applicants/Plaintiff

Mr Mutia holding brief for Mr Mbaluka for Defendant present