



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 41 of 2012

1. APOLLO ONYANGO NJAGO

2. EUNICE JUDITH OWITI.....PLAINTIFFS

VERSUS

SAVINGS & LOAN KENYA LIMITED.....DEFENDANT

RULING

In this suit filed on 17th February, 2012 the plaintiffs have sought against the defendant for an order that the defendant’s act of advertising for sale of their piece or parcel of land known as Ngong/Ngong/14325, “ *the suit premises*” without service of the statutory notice was wrongful and unlawful, a permanent injunction restraining the defendant from selling, advertising for sale, transferring or in any way disposing of or interfering with the plaintiffs’ occupation and ownership of the suit premises, damages, interest and costs.

The suit was informed by the following salient factors; the plaintiffs are the registered proprietors of the suit premises. They sometimes in 2004 executed a charge over the same in favour of the defendant to secure a loan granted to them by the defendant in the sum of Kshs. 1,400,000/=. Subsequent thereto they received a letter dated 25th September, 2009 purporting to issue Notice of intention to commence sale of the suit premises under the defendant’s statutory power of sale. Their advocates immediately wrote to the defendants objecting to the letter and pointing out that the letter was not a statutory notice of intention to sell as envisaged under section 74 of the Registered Land Act as it had been issued pursuant to section 65(2) of the same act. As the purported Statutory Notice served upon the plaintiffs was issued pursuant to a section of the registered Land Act which does not confer the power of sale, the Notice was invalid. The power of sale cannot arise without full compliance with the Statute. In the premises, the power of sale as envisaged under section 74 of the Registered Land Act had not crystallized and or accrued and the intended sale of the suit premises was therefore unlawful. In the alternative the plaintiffs pleaded that the purported exercise of the alleged statutory power of sale constituted improper conduct amounting to fraud in law. They proceeded to give particulars of fraud. Otherwise the defendant was intending on proceeding with the wrongful sale of the suit premises, hence the suit.

Contemporaneously with the filing of the suit, the plaintiffs took out a Notice of Motion application seeking an injunction to restrain the defendant from exercising its statutory power of sale until the hearing of the application *interpartes* and thereafter until the hearing and determination of the suit. The grounds and affidavit in support of the application merely reiterated the salient facts of the suit that I have already set out above. Suffice to add that is from the plaintiffs’ perspective and on the above, facts, a *prima facie case* with a very high probability of success had been established, that damages cannot be an adequate remedy where the suit premises has been sold pursuant to an illegal process of realization of the security and that the balance of convenience lies in their favour.

At the *ex-parte* stage, the application came before me on 20th August, 2012 and I certified it as urgent. I also granted temporary injunction which was to last for 14 days only. Accordingly prayers 1 and 2 of the application are spent. What we will therefore grapple with in this application is whether or not to confirm the temporary injunction aforesaid until the hearing and determination of the suit and costs of the application.

In response to the application, the defendant through one, **Peter Weru**, the Credit Support Manager swore a replying affidavit. He swore where pertinent that the plaintiffs applied for a loan facility of Kshs. 1,400,000/= from the defendant sometimes in 2004, which application was accepted. Among the conditions listed in the offer duly signed by the plaintiffs was the creation and perfection of the charge over the suit premises as security to secure the repayment of the loan, which charge was duly prepared and registered against the suit premises. It was a further term of the said letter of offer, which was duly accepted by the plaintiff that they would make monthly repayments of Kshs. 29,000/= for a period of 7 years. Sometimes in the year 2009, the plaintiffs started defaulting in making the monthly repayments aforesaid which act prompted the defendant to issue requisite statutory Notice in an effort to redeem its security. To the defendant the allegation that the statutory notice issued as aforesaid was defective because it was issued under section 65(2) as opposed to section 74 of the Registered Land Act is not true. On the other hand, it matters not under what section the statutory notice is issued neither does it matter its form, if it is very clear and unambiguous that it is a three months statutory notice. The defendant further deponed that a chargee's power of sale is not created by the statutory notice but it is one of the remedies incumbent in transactions of this nature and any section of law allegedly wrongly quoted does not make inoperative a statutory notice. After the plaintiffs failed to comply with the notice, the defendant appointed **Leakey's Auctioneers** to advertise and sell the suit premises who proceeded to issue a 45 days redemption notice to the plaintiffs requesting them to redeem the suit premises by paying off the outstanding amount otherwise the suit premises would be sold. The plaintiffs failed to redeem the premises as requested and the auctioneers proceeded to issue a notification of sale of the suit premises through a public auction. From the foregoing, it is clear that the allegations by the plaintiffs that the defendant did not comply with the requirements for redemption of the suit premises is clearly untrue and out to misled the court. The plaintiffs have not been making any monthly repayments towards the redemption of the mortgage account even after they were issued with the statutory notices and thus it was only fair, just and equitable that it should be allowed to realize its security. The plaintiffs had otherwise not established the conditions for the grant of injunctions.

When the application came before me for *interpartes* hearing on 7th May, 2012, **Mr Ogwe** and **Mr. Malili**, learned counsel for the plaintiffs and defendant respectively agreed to canvass the application by way of written submissions. Both parties subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

The application has been filed under Order 40 rule 2 of the Civil Procedure rules. This section deals with injunction to restrain breach of contract or other injury. If the plaintiffs have to succeed under this section, they must demonstrate that the defendant is in breach of the contract and such breach has occasioned them some injury. On the material placed before me so far, I doubt whether the plaintiffs have acquitted themselves very well on that aspect of the matter. It is common ground that the plaintiffs obtained a loan from the defendant. It is also common ground that the plaintiffs have since defaulted in the repayment of the loan. It is also further common ground that the defendant as a result of the plaintiffs' default in the repayment served them with a statutory notice. The plaintiffs' only beef with the statutory notice is that it was issued pursuant to section 65(2) as opposed to section 74 of the Registered Land Act. However, to my mind this is a non issue as both sections deal with the chargees remedies upon a secured charge. In any event insistence on sections under which the notice ought to have been issued is a matter of procedural justice and technicality of procedure, which ought not and should not be used to defeat substantial justice. That is the essence of Article 159(2) (d) of the Constitution. We are called upon to exercise judicial authority and administer justice without undue regard to procedural technicalities. The plaintiffs having taken the loan and failed to repay the same, a fact which they do not dispute, they are the ones in breach of the contract. I cannot therefore see how they can rush to the court of equity for assistance. Their act of breach makes their hands unclean and thus they cannot seek an equitable remedy because equity dictates that he who seeks its protection must do so with clean hands. The plaintiffs having

breached the contract, their remedy does not lie with Order 40 rule 2 of the Civil Procedure rule.

The foregoing notwithstanding, has the plaintiffs met the threshold for granting interlocutory injunction set out in the celebrated case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358**. The said well known tests are as follows:-

- The applicant must show a *prima facie* case with a probability of success.
- An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury
- When the court is in doubt, it will decide the application on a balance of convenience.

I may also add that an injunction is both discretionary and equitable remedy. It therefore behoves a person seeking it to conduct himself in a manner that the court will not disapprove both before and after the filing of the application. He must be open and candid to court. He should not hide anything, must play above board and should not be found wanting in material non-disclosure.

With regard to whether the plaintiffs have established a *prima facie case* with a probability of success, I must say at once that I have very strong doubts with regard to that aspect of the matter. The plaintiffs have admitted having taken the loan, failing to repay the same and being served with a statutory notice though according to them, it was issued under the wrong provisions of the law. It is also common ground that the charge created over the suit premises was clear that in the event of default in making the repayments, the suit premises would be sold pursuant to the defendant's statutory power of sale. Since the plaintiffs have by inference from their own pleadings admitted owing the defendant the loan amount, what is left in the suit that should go for trial? I have already addressed elsewhere in this ruling the issue of the notice being issued and served under section 65(2) as opposed to section 74 of the Registered Land Act. I need not repeat here what I have already said in this regard. In any event in the case of **Godfrey Ngumo Nyaga v Housing Finance Company of Kenya Limited, Civil Appeal No. 134 of 1987(UR)** the Court of Appeal emphatically stated:-

“... where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there is no basis on which the right could be exercised or if it was being exercised oppressively. In this case there was no ground for finding that the company had no basis for action and there is no evidence of oppression having in mind that the applicant is still indebted to the company, putting his case at its highest...”

These words aptly summarize the circumstances obtaining in this case. There is no doubt at all that given that the plaintiffs took a loan which they have not repaid, the defendant's right of sale has crystallized. The plaintiffs in my view have no case to warrant the grant of an injunction.

Having held that the plaintiffs have failed to demonstrate a *prima facie* case with a probability of success, I should not even explore the remaining limbs or tests for granting injunction. However, for completeness sake, I will endeavor to deal with them albeit briefly. Will the denial of an injunction cause injury or loss to the plaintiffs that cannot be compensated by an award of damages? I do not think so. The value of the suit premises can be valued and ascertained to the last penny. The defendant is a reputable financial institution that is capable of compensating the plaintiffs for the loss in the unlikely event that the court finds in their favour. I have not heard them say that the defendant may be incapable of compensating them. In any event, in the case of **Moses Ngenye Kahindo v Agricultural Finance Corporation, HCCC No. 1044 of 2001 (UR) Ochieng, J** held:-

“... A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question...” I could not have put it any better.

With regard to balance of convenience, I would say that the same wholly falls in favour of the defendant. This is after taking into consideration the fact that the plaintiffs do not deny taking the loan, they do not deny their default nor do they deny receiving the statutory notice. The defendant should realize the security in order to recover the amount disbursed to the plaintiffs at their request and instance.

Coming back once again to the plaintiffs' complainant that the underpinning statutory notice was defective, it is my view that what matters is the fact that the statutory notice that is clear and unambiguous was issued and served on the plaintiffs pursuant to the charges. It matters not under what section of the charge document is issued and served.

For all these reasons, I find no merit in the plaintiffs' application. It is accordingly dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH SEPTEMBER, 2012.

ASIKE MAKHANDIA
JUDGE