



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 518 of 2010

SULEIMAN RASHID SHAKOMBO.....1ST PLAINTIFF

HANIFA SULEIMAN SHAKOMBO.....2ND PLAINTIFF

VERSUS

SAVINGS & LOAN (K) LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS.....2ND DEFENDANT

RULING

This application is brought by a Chamber Summons dated 28th July, 2010 and taken out under **Order XXXIX Rules 2(1) and 9** of the **(old) Civil Procedure Rules**. The Applicants thereby pray for an injunction restraining the Defendants from selling by public auction or otherwise the property known as Maisonette No. "A" situate on **L.R. No. 1/855** Nairobi, pending the hearing and determination of the suit.

The application is supported by the annexed affidavit sworn by the 1st Applicant on 28th July, 2010 and is based, *inter alia*, on the grounds that-

- (a) No statutory notice was issued by the 1st Defendant to the Plaintiffs or any one of them prior to the 1st Defendant purporting to exercise its statutory power of sale.**
- (b) The 1st Defendant's statutory power of sale has not arisen and the intended sale of the suit property on 3rd August, 2010 is illegal and irregular.**
- (c) The Plaintiffs have made alternative arrangements to clear the mortgage debt (subject to determine of the interest rates and other charges levied on their mortgage account) and are desirous of discharging and releasing the suit property from the effects of the charge.**
- (d) The Plaintiff and each one of them stand to suffer irreparable loss and damages unless the Defendant is restrained by an order of injunction.**

The Respondents oppose the application by way of a replying affidavit sworn on 17th September, 2010 by one Anthony Kasyoka, a Relationship Manager, Credit Support, with Kenya Commercial Bank Limited.

With leave of the court, the parties herein filed skeleton submissions.

The first issue raised by the Respondents was that pursuant to Gazette Notice Number 1036 of 2nd October, 2009 and issued under Section 9 of the Banking Act, Savings and Loan Kenya Limited was amalgamated with Kenya Commercial Bank with effect from 1st January, 2010, and the Applicant ought to have sued the Kenya Commercial Bank and not Savings and Loan Kenya Limited. Whereas that is the way it should have been, I think that the Applicants can be accommodated by allowing them to amend the Plaintiff in order to conform with the present reality on the ground.

With regard to the issue of money owing to the Respondents, Mr. Kasyoka avers in his replying affidavit that the Applicants have never repaid the facility in terms of the instrument of mortgage. This assertion drives some support from paragraph 8 of the affidavit sworn by the 1st Applicant wherein he states that the Applicants “*fell into economic difficulties in repaying the mortgage debt*” and that at the date of swearing his affidavit (i.e on 28th July, 2010) they had paid KShs. 1,000,000/=. This is a confirmation that the Applicants indeed owe the Respondent some money.

The next issue picked by the Applicants is that they were not served with a statutory notice. That is not correct. They were served with a statutory notice dated 24th June, 2009, and sent by registered post to the Applicant’s postal address given in the mortgage document.

In view of the foregoing, I find that the Applicants have not made out a *prima facie* case with a probability of success. Secondly, I note from the Applicant’s claim in the plaintiff that they are claiming general damages. This shows that they can be compensated in monetary terms, and therefore there is a good alternative to an injunction. In the circumstances, I find that the main conditions for the grant of an injunction as laid down in **GIELLA v CASSMAN BROWN & CO. LTD [1972] E.A 358**, have not been satisfied.

For the foregoing reasons, this application fails and it is hereby dismissed with costs.

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 19th day of November, 2012.

MABEYA
JUDGE