



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Suit 142 of 2012**

**PATRICK MAGUTA MWANGI:::1ST PLAINTIFF**

**JULIA NJERI KAMAU:::2ND PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK LIMITED::DEFENDANT**

**RULING**

On 5th July, 2012, the plaintiffs filed this suit against the defendant seeking two orders, apart from costs, namely an injunction restraining the defendant from selling, disposing and or on any way dealing with land parcel number **Eldoret Municipality/Block 16 (Kamukunji)/553** (hereinafter “the suit land”) and a declaration that the intended sale of the suit land is illegal, wrongful and ill advised.

The foundation of the plaintiff's claim is pleaded in paragraphs 4,5,6,7 and 8 of the plaint. In a nutshell the plaintiffs plead that the defendant advanced a loan to an entity called **Taguma Limited** (hereinafter “the company”) on the security of a charge over the suit land belonging to the plaintiffs but without notifying them of the said company's default and without servicing a statutory notice, advertised to sell the suit land. In the premises the plaintiffs plead that the intended sale is illegal ill-advised and should be stopped by an order of injunction. In the alternative the plaintiffs aver that should the intended sale be found proper, they should be given an opportunity to sell the suit property or a portion thereof by private treaty.

Simultaneously with the plaint, the plaintiffs filed the application before me and seek the same order of injunction on an interim basis. The plaintiffs have supported the application by an affidavit of the first plaintiff sworn on 5th July, 2012. It is deponed in the affidavit, *inter alia*, that the plaintiffs guaranteed the repayment of Kshs. 10,000,000/- loaned to the said company by the defendant in October, 2011 but have since had no communication from the defendant and are not even aware that there has been default; that they have not been served with statutory and auctioneer's notices and that they stand to suffer irreparable loss unless the sale is stopped.

The application is opposed and there is a replying affidavit of one **Felix Kimani Njenga**, the Branch Manager of the defendant's Eldoret Branch. In the affidavit, it is deponed, *inter alia*, that the plaintiffs are the only two shareholders and directors of the said company and are not candid when they allege that they are not aware of the default by the said company; that the plaintiffs were indeed served with statutory and auctioneer's notices and their application has no basis in law and is an abuse an abuse of the court process. Annexed to the affidavit are various exhibits including copies of the said notices.

When the application came up for hearing before me on 18th July, 2012 counsel agreed to file written submissions in which counsel reiterated the positions taken by their clients in their respective

affidavits.

I have considered the application, the affidavits filed the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. The principles for the grant of an interim injunction are well settled. They were crystallized in **Giella -Vs- Cassman Brown & Company (1973) EA 358**. They are firstly, that the applicant must show a *prima facie* case with a probability of success at the trial. Secondly, an injunction will not normally be granted unless the applicant will suffer an irreparable injury which cannot be compensated by an award of damages and thirdly, if the court is in doubt, it should determine the application on a balance of convenience.

The plaintiffs challenge the defendant's right to exercise its statutory power of sale on the ground that they were not served with the requisite statutory notice of sale and auctioneer's notices. The defendant has responded that it indeed served those notices and has exhibited copies thereof and a copy of the certificate of posting. It is plain however that the original statutory notice of sale was served upon the said company and copies thereof were served upon the plaintiffs. There was no statutory notice addressed to them. Yet they are the chargors. The charge document describes them as such.

The suit property is registered under the Registered Land Act. Section 74 of that Act reads as follows:-

**“74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or any part thereof, or in the performance or observance of any agreement expressed or implied in any chargee, and continues for one month the charge may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be;**

**(2) If the chargor does not comply, within three months of the date of service with a notice served on him under sub-section (1), the chargee may**

**(a) .....**

**(b) sell the charged property.”**

So, the above provisions unequivocally require the chargee to demand payment from the chargor and it is only when the chargor defaults within the period appointed under the said section that the chargee may sell the charged property.

In this case, the defendant has contended that the plaintiffs are the only shareholders and directors of the said company and knew that the said company was in default of repayment of the loan since the statutory notice was served upon the company and copied to them. That may vary be the case, but in law service of the statutory notice upon the company could not be service upon the plaintiffs. The company has, in law, a separate legal existence distinct from the plaintiffs. The company may have been the borrower but it was not the chargor.

Service of a statutory notice is a statutory requirement and a chargee's power of sale is not exercisable without proof of such service. In the premises, the plaintiffs have demonstrated, *prima case*, that the defendant's statutory power of sale is not exercisable now.

There is however, no doubt that the defendants are owed a large sum of money and the only basis of granting a temporary injunction is the want of service of the statutory notice of sale. If that impediment is removed, the defendant's statutory power of sale will arise and will become exercisable.

In the circumstances, I allow the application dated 5th July, 2012 to a limited extent. The injunction sought to restrain the defendant from selling the charged property is granted not until the suit is heard and determined but until the defendant serves the plaintiffs with the requisite statutory notice of sale.

The plaintiffs may use the period of the notice to present to the defendant prospective purchasers of the suit property should they fail to redeem the charge before the expiry of the period of the notice to be

served.

It is so ordered.

**DATED AND DELIVERED AT ELDORET**

**THIS 14TH DAY OF NOVEMBER, 2012.**

**F. AZANGALALA**  
**JUDGE**

**Read in the presence of:-**

**Ms. Nyambegera for the Applicant and**

**Ms. Langat H/B for Mr. Manani for the Defendant.**

**F. AZANGALALA**  
**JUDGE**

**14TH NOVEMBER, 2012**