



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 443 of 2012

JANE WANJA MIRITI.....PLAINTIFF

-VERSUS-

FINA BANK LIMITED.....1ST DEFENDANT

GEORGE NJOROGE MUIRURI T/A LEAKEY'S AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Notice of Motion before the Court is dated 10th July 2012 and is expressed to be brought under Order 40 Rule 1 (a) (b), 2 and 3, Order 51 Rule 1 and 9 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The application seeks for a temporary injunction against the defendants by themselves, their servants and or agents from selling, taking possession or disposing of all the Land Parcel known as Parcel No. Nairobi Block 82/4093, situated at Donholm Estate until the determination of the suit. The application also seeks for orders of a temporary injunction against the 2nd defendant restraining them from interfering with the possession, selling, disposing off, alienating or any other dealing with the suit property pending the determination of the suit.
3. The grounds upon which this application is based are extensively stipulated in the body of the application and elaborated at length in the supporting affidavit of the applicant. The application is supported by the affidavit of JANE WANJA MIRITI sworn on 10th July 2012 together with its annextures.
4. The application is opposed. The defendants have filed a Notice of Preliminary objection dated 18th July 2012 as well as a replying affidavit of PURITY KINYANJUI, the head of Debt Recovery Unit at the 1st defendant's bank and sworn on 24th July 2012 together with its annextures.
5. The background of the application is that vide a letter dated 18th August 2010 the plaintiff applied for a loan facility from the 1st defendant which was accepted vide a letter of offer dated 1st September 2010. The loan was secured, by inter-alia, a legal charge over the suit property in favour of the 1st defendant. On 27th June 2012, the plaintiff saw an advert by the 2nd defendant, acting on the instructions of the 1st defendant, on the Daily Nation Newspaper, advertising the sale of the suit property by public auction on 13th July 2012. The said intended sale by public auction is what prompted the current application.

6. It is the plaintiff's claim that she has not defaulted or been in arrears of the loan repayment and that if there is any such default, she has not been issued with any letter or notice stating the amounts of default due. The plaintiff contends that she was not aware of the 1st defendant's intention to exercise its statutory power of sale as the 1st defendant failed to serve her with the statutory notice of sale and the 2nd defendant failed to serve her with a 45 day redemption notice and a notice of sale of the suit property as required by law. It is therefore the plaintiff's case that the 1st defendant's statutory power of sale has not arisen.

7. The plaintiff avers that she has diligently met her obligations subject to the loan agreement till March 2012 whereupon she has undergone financial difficulties due to escalating interest rates of the said credit facilities. It is also the plaintiff's case that the 1st defendant has breached its duty under the Banker-Customer contract by failing to render a complete, true and accurate account of her account with the 1st defendant.

8. The 1st defendant avers that the plaintiff paid regular monthly installments only in the months of November and December 2010, January 2011 and thereafter started making irregular payments. It is the 1st defendant's case that the plaintiff was duly served with the requisite three months statutory notice vide a letter dated 3rd June 2011 duly served through registered post. At the expiry of the statutory notice, the plaintiff had not remedied her breach as a result of which the 1st defendant instructed the 2nd defendant to issue a 45 days' notice pursuant to rule 15 (d) of the Auctioneers Rules 1997. It is averred on behalf of the 1st defendant that the Auctioneers Notice as well as the notification for sale was duly served upon the plaintiff personally on 15th September 2011. It is further averred that at the expiry of the Auctioneers 45 days' Notice, the plaintiff had not made good the 1st defendant's demand as a result of which the 2nd defendant advertised the suit property for sale by public auction which was to take place on 22nd May 2012.

9. The 1st defendant contends that a day before the auction, the plaintiff moved to the Chief Magistrate's Court in CMCC No. 2625/2012 and obtained an interim order restraining the 1st defendant from exercising its statutory power of sale. It is further contended that on 6th July 2012, the Chief Magistrates Court declined to reinstate the interim orders granted to the plaintiff. The 1st defendant avers that they had instructed the 2nd defendant to re-advertise the property for sale by public auction since the plaintiff was still in breach of her obligation to repay the loan. The said advertisement was in the Daily Nation Newspaper of 27th June 2012 and the auction was set for 13th July 2012. Once again, the plaintiff moved to court and filed the current suit and obtained an interim order on 11th July 2012 restraining the 1st defendant from proceeding with the sale of the suit property.

10. It is the 1st defendant's case that the interim orders for injunction were granted without the plaintiff making material disclosures as to the existence of CMCC NO. 2625/2012. It is further the 1st defendant's case that such orders would not have been granted if the plaintiff disclosed that she had filed a similar suit in the lower court which had neither been withdrawn nor determined.

11. I will begin with the issue of a similar suit pending in the chief Magistrate's Court. I have perused the alleged pleadings filed at the CM's Court and the heading of the said pleadings indicates that the same was to be filed in the High Court. Though it is not disputed by the plaintiff that they obtained interim orders in CMCC No. 2625/2012, there seems to have been a case of mis-filing. The plaintiff also avers that by consent the parties withdrew the said case, a fact the defendant does not agree to as they maintain that the suit is still subsisting. That notwithstanding, it is my considered view that the suit at the CM's Court related to an earlier auction while the current suit relates to another auction which was set for 13th July 2012. That being the case, it is my humble view that the plaintiff was entitled to bring the current suit before this court. In any event, no sufficient evidence has been led to the effect that the suit at the Chief Magistrate's Court is still subsisting and whether it is sustainable.

12. Now, turning to the substance of the application, one of the main grounds advanced by the plaintiff is that she was not served with a Statutory Notice and a Notification of sale as required by law and therefore the defendant was not entitled to exercise its statutory power of sale. These facts have been rebutted by the defendants who maintain that the plaintiff was properly served with the requisite notices. The defendant went ahead and exhibited evidence to the effect that the plaintiff was indeed served. I have perused the said documents and there is no doubt that the plaintiff was served and in fact received the requisite Notices. The plaintiff has not disputed the said documents as served upon her and the fact that she received them. There is also no dispute as to the address of the plaintiff where the statutory notice was sent by registered post.

13. As regards the issue of proper accounts, from the pleadings it is clear that the plaintiff is aware that she was indebted to the 1st defendant. Nevertheless, the issue of dispute as to accounts is not one that can found a basis for grant of injunction orders as was pointed out in the case of **MRAO LIMITED VS. FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] KLE 125**. The plaintiff also claimed that the bank had charged her high interest rates contrary to the Central Bank Act. However, the plaintiff did not exhibit any evidence of how the high interest rates were charged.

14. In view of the foregoing, this court finds that the plaintiff has not established a prima facie case to warrant her the injunction orders sought as contemplated in the celebrated case of **GIELLA -VS- CASSMAN BROWN & CO. LTD 1973 E.A 358**.

15. Having found so, the plaintiff's Notice of Motion dated 10th July 2012 is hereby dismissed with costs to the defendants.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF DECEMBER 2012

**E.K.O OGOLA
JUDGE**

Present

Meme H/B for Ngare for Plaintiff/Applicant

M/s Njoroge for Defendant