REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 249 OF 2009

MARY W. NGUNJU ……..……..…PLAINTIFF/APPLICANT

VERSUS

1. COMMERCIAL BANK OF AFRICA
2. SAMUEL M. MUGARO ..... DEFENDANTS/RESPONDENTS
t/a MISA AGENCIES

R U L I N G

In the background is the plaintiff's plaint dated and filed on **22nd July, 2009**; and the plaintiff now comes by Chamber Summons application of even date, brought under s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), and Order XXXIX, Rules 1 (a), 2, 3 and 9 of the Civil Procedure Rules.

The application carried one substantive prayer:

"THAT pending the hearing and determination of this suit, the defendants/respondents by themselves, their servants, agents or otherwise howsoever be restrained from selling the property known as L.R. No. MN/III/3029 by public auction as threatened or otherwise howsoever interfering with the plaintiff's/applicant's property."

The grounds for the prayer are thus stated:

*(i) the 2nd defendant, upon instructions or directions from 1st defendant, has issued a notification of sale of the plaintiff's aforementioned property dated **7th July, 2009**, stating that the said property may be sold any time after 45 days from the date of the notice;*

*(ii) the plaintiff who is guarantor to a debtor, one **Francis Kihiko t/a Thamani 2004 Investments**, was not notified of any default in debt-payment by he debtor;*

*(iii) the defendant's statutory power of sale under a charge on the suit property issued by 1st defendant in favour of **Francis Kihiko** and guaranteed by the plaintiff, had not arisen;*

*(iv) the purported notice of attachment dated **7th July, 2009** posted on a board next to the plaintiff's property is defective; it does not comply with the mandatory provisions of s.69A of the Transfer of*

Property Act;

*(v) the notification of sale of immovable property issued by 2nd defendant dated **7th July, 2009** and posted on a board next to the plaintiff's property is not valid, and the same is not in compliance with the Auctioneers' Rules;*

(vi) the property advertised for sale is the plaintiff's lifetime investment and there is a grave danger, in the absence of restraint orders, that the same may be disposed of by sale.

The evidence in support of the application is in the plaintiff's affidavit sworn on **22nd July, 2009**. An officer of 1st defendant, **Kepha Nyakundi** swore a replying affidavit on **18th August, 2009**: he avers that the plaintiff *"was indeed notified of the default made by the principal debtor, **Mr. Francis Kihiko** t/a Thamani 2004 Investments"* — by a letter dated **18th July, 2008** addressed to both the principal debtor and the plaintiff; the sum then outstanding was Kshs. **863,628/30**. The said letter is deponed to have given the plaintiff *"the requisite statutory notice to comply … by making payment of the then outstanding sums of money …"*; otherwise the 1st respondent would proceed to exercise its statutory power of sale; the said letter was sent to the applicant by both registered post and ordinary mail. The deponent deposes that *"the averments contained in the applicant's supporting affidavit … are not true."*

The deponent believes to be true the advice of his Advocate that *"the applicant, having chosen to commercialize the use of her property, ought not to invoke sentiments … [of] sympathy which have no room in commerce."* The deponent believes to be true the advice of his Advocate, that 1st respondent is properly exercising its statutory power of sale, which has arisen; and that, the applicant has established no legal basis for craving the Court's discretion to grant the equitable remedy of injunction.

Counsel for the plaintiff submitted that there was a *prima facie* case for granting the prayers sought: for the statutory notice from 1st defendant had been posted to the wrong address; and, by s. 69A of t he transfer of Property Act, 1882:

"A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until …

(a) notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service …"

Counsel urged that 1st defendant had not proved that service of the statutory notice **was** effected: the statutory notice was sent to a wrong address. This fact alone, it was submitted, showed that the applicant had a *prima facie* case for grant of injunctive relief, on the principles set out in **Giella v. Cassman Brown** [1973] E.A. 358.

Counsel urged the Court to be guided by the principle set out by this Court in **Suleiman v. Amboseli Resort Limited** [2004] 2KLR 589 (at p. 607):
"The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice."

Adopting the foregoing principle, learned counsel thus submitted:

"… considering this principle and the circumstances of the above matter where *service* is the aspect in dispute, the applicant would suffer irreparable damage and loss if the orders sought are not granted, *and* … the injustice that would [befall] her if the orders are not granted is higher … for reasons that the applicant would lose her house."

Counsel submitted that the plaintiff, if not granted the orders sought, *"stands to suffer irreparable injury and loss that cannot be compensated by way of damages";* and at the same time, 1st respondent is in a financial position to repay money back to the applicant if the case ultimately turns in favour of the

applicant, whereas a sale of the suit property would deny the plaintiff an object of great sentimental attachment.

Counsel submitted that the balance of convenience stood in favour of the applicant, for *"the inconvenience suffered in losing a house [with] sentimental value, is greater than any monetary compensation …."*

The first question that preoccupied the 1st respondent's counsel was, the applicant's address to which the 1st respondent's statutory notice should have been addressed. In the guarantee agreement, the address given by the applicant was **P. O. Box 90218, Mombasa**; but in the certificate of title, the applicant's address is shown as **P. O. Box 95785-80100, Mombasa**. The plaintiff's statutory notice was sent to **P. O. Box 95795-80106**, Mombasa, but the applicant now states that the correct address should have been **P. O. Box 95795-60100, Mkomani, Mombasa.**

Counsel urged that the applicant be *"not allowed to state that the said postal address is wrong"*, for if it is wrong, then the applicant *"should be found guilty of material non-disclosure"*; counsel urged that *"he who comes to equity must come with clean hands"*.

Counsel urged that there was no significance to the fact that the suit property was the plaintiff's *"lifetime investment"*; for she *"clearly understood when she executed the charge that in [the] [event the debtor failed] to pay, she would be obligated to satisfy the debt."* Counsel submitted that the applicant had chosen to commercialize the use of her property, and so she *"ought [not] to invoke sentiments from the standpoint of sympathy which have no room in commerce."* Reliance was placed in the case, **Faud Mahamed Mohamed v. Commercial Bank of Africa Limited,** Nairobi H.C.C.C. No. 379 of 1999, in which **Kassim Shah, C.A.** held:

"… persons who put up their homes for commercial loans have no business to lament about sentimental value of the said homes when the same are later auctioned …"

Counsel submitted that even if the Court were to decide the matter on the 'balance-of-convenience' test, this would not favour the applicant: for the application was filed on **22nd July, 2009**, and since then, the applicant has been aware that the debtor defaulted, and so it became necessary for 1st respondent to realize the security, by exercising the statutory power of sale; but the applicant has not shown any attempts by herself to get hold of the principal debtor and find out the relevant state of information.

Counsel submitted that the applicant has not shown how she will suffer any irreparable loss if the instant application is not allowed.
While the 1st defendant's case is quite clear, and the commercial transactions under which that defendant advanced a loan facility are manifest, the plaintiff contends, *inter alia*, that owing to a mix-up in the postal-address particulars, the 1st defendant's statutory notice had not been served upon her.

The alleged **non-service of statutory notice** is the basis of the plaintiff's entire case; and therefore, once accurate notification is rendered, the 1st defendant should, in principle, be able to exercise all its rights under the charge document. The plaintiff who is to be taken to acknowledge that point, has had her suit and application pending since **22nd July, 2009.** Should that acknowledgement be regarded as sufficient notice to the applicant? As a **fact,** the whole period of the pendency of the suit and the application amounts to *de facto* notice to the applicant. However, it is essential that there be **procedural compliance** with the contractual terms based on the charge-document, as a basis for the applicable measures of redress. In the duly-signed charge document dated **2nd June, 2006** it is thus provided (Section 7 (l)):

"That any notice required or authorized by law or by this Charge to be served by the Chargee on the Chargor and/or the Borrower shall be sufficiently served if it be sent by post in a stamped envelope addressed to the Chargor and/or the Borrower at their/its last known postal address in Kenya or if it be delivered to the place of abode or business of the Chargor and/or Borrower or to the Charged Property *AND THAT* proof of posting shall be proof of service."

Subject to the resolution of the applicant's issue on service of statutory notice, this application will resolve in favour of the 1st defendant, rather than of the plaintiff. However, in view of the fact that different postal addresses of the applicant are on record, and taking judicial notice that the postal system sometimes entails mix-ups in mail delivery, I will create an opportunity for a second service of the 1st defendant's statutory notice. I will make the following Orders:

(1) The 1st defendant shall, within five days of the date hereof, effect service of the statutory notice up the plaintiff.

(2) The plaintiff shall thereupon, within 21 days, comply with the terms of the Charge of *2nd June, 2006.*

(3) Failing compliance with the terms of Order No. (2) herein, the 1st defendant shall proceed to realize the security for the loan, on the basis of the said Charge of *2nd June, 2006.*

(4) The plaintiff/applicant shall bear the costs of the instant application.

DATED and **DELIVERED** at **MOMBASA** this **1st** day of **April, 2011.**

……..
J. B. OJWANG
JUDGE

Coram**: Ojwang, J**
Court Clerk**: Ibrahim**
For Plaintiff/Applicant**: Mr. Adhoch**
For 1st Defendant/Respondent
For 2nd Defendant/Respondent **Mr. Buti**