



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE HCA 298 OF 2010

SAMUEL GITHURE MAINAPLAINTIFF

VERSUS

FAMILY BANK LTD & ANOTHER.....DEFENDANTS

R U L I N G

The appellant, **Samuel Githure Maina**, filed an appeal against the ruling of the Resident Magistrate(B Kituyi),delivered on 22/10/2010 in Nakuru CMCC 549/2010. In the application before the trial Court, Family Bank , the 1st respondent had purportedly issued a statutory notice of sale to the applicant and a 45 days redemption notice. The trial court found that the respondent had the right to exercise its power of sale. The applicant filed the Notice of Motion dated 20/11/2010, seeking an order of temporary injunction to restrain the defendant/respondent by themselves or their agents or servants from selling, alienating, or disposing of the suit property Dundori/Lanet Block 5/894 (New Gakoe) pending the hearing of the appeal .

The grounds upon which the applicant brings this application are that the appeal has high chances of success; that the appellant will suffer substantial loss if an injunction is not granted, the respondent has advertised the said property for sale and it is likely to be sold.

In the supporting affidavit, the applicant denies that he was ever served with the statutory notice of sale nor was he served with the 45 days redemption Notice . Mr Ogolla, counsel for the applicant urged that there was no evidence that the notice was ever served on the applicant nor was the redemption notice as provided under Rule 15, (d) of the Auctioneer's Rules. It was also submitted that upon being served with the plaint and summons, the appellant did not enter appearance but instead on 21/6/2010 ,a notice of appointment was filed by Waiganjo Advocate and that was in contravention of Order 6 Rule (2) (1) of the Civil Procedure Rule (Old order 8 Rule 2). It was counsel's contention that a memorandum of appearance should have been filed and in default, the respondent 's documents should have been expunged from the record; that a defence was filed after after a judgement was entered against the Defendant on 8/7/2010.The same has not been set aside to date. Counsel distinguished the case with the ruling in Henry Wanyama

Khaemba vrs Standard Chartered Bank Ltd ca 45/05 and Mountain View Transporters Ltd Vaccon Holdings Ltd CA 385/04 where the courts observed that an order of injunction would not be granted due to non disclosure of material facts. He submitted that in the above cited case the statutory notice had been served but that is not the case in the instant case.

In opposing the application, the respondent filed a replying affidavit sworn by Kenneth Kirugi, an advocate practicing in the firm of J. M Waiganjo & Co advocates, which firm has the conduct of the matter. Mr Kirugi argued that the issue of statutory notice of sale was raised and urged in the trial court. He urged that the respondent showed the court, that statutory notice that had been issued which is evidence that the same was served. Counsel also urged that the lower court considered the issue of material non-disclosure and the orders that had been issued ex-parte were not confirmed. He agreed with the principle in *MOUNTIAN VIEW CASE* that once the statutory notice of sale was served, even if the redemption notice was not issued, if chargee was still indebted to the chargor, then the chargee could exercise the power of sale, as happened in this case.

As regards the filing of memorandum of appearance the lower Court also addressed the issue and observed that the Court can only strike out the appearance under Order 9 Rule 4 of the CPR and that there was no fatal mistake made that could call for striking out of the appearance and defence. Counsel urged the Court to note, that the objection comes late in the day, because way before the application came up. On 9/9/2010, the applicant's counsel had on 14/6/2010, entered into a consent and that is why the lower court said that the applicant relied on mere technicalities. It was further submitted that unless the exercise of power of sale was oppressive, the Court would not interfere with it and since the applicant is still indebted to the respondent, the execution cannot be stopped. Counsel said that in *Henry Khaemba's*, case the court noted that since the statutory notice was properly served, the court could not interfere with the Respondent's power of sale.

In the instant case, it is not denied that the applicant did execute the charge document is still indebted to the Respondent.

I have considered the authorities relied upon and it is worth pointing out that in these authorities orders of injunction were not made pending appeal, but the Courts were considering applications for injunctions upon filing suit. This is a slightly different scenario.

In his submissions, the applicant's counsel has repeated submissions made in the lower court. The applicant only needs to demonstrate that he has an arguable case on appeal but need not to go into every details of the arguments made in the lower court because that is for appeal. I have read the ruling of the lower Court. Though the trial Court made a finding that the statutory notice was served on the applicant, It did not indicate the reasons for arriving at that conclusion. The mode of service of the notice was not disclosed either in the lower court or in this application. The production of the statutory notice in this Court is not evidence of service of the said notice on the applicant.

The lower court also made a finding that the applicant was guilty of material non-disclosure but did not state the basis for that finding. Similarly, the trial court made a finding that the applicant had complied with Order 9 Rule 4 CPR but did not back that finding with any reasons. In the circumstances, I do find that the applicant has an arguable appeal and he should be accorded a chance to urge his appeal. If an order of injunction is not granted, the land which was used as security in obtaining the loan is threatened with sale and may be put outside the applicants' reach and the substratum of this appeal is be totally destroyed. For the above reasons, the Court is inclined to grant an order of injunction in terms of prayer 3 of the Notice of Motion dated 30/11/2010, restraining the respondent from selling, alienating or disposing of Dundori/Lanet Block 5/894 (New Gakoe) pending the hearing and determination of the appeal. However, I have observed earlier that the applicant does not deny that he has defaulted with the loan repayment. The order of injunction does not mean that he is relieved of his obligations under the charge. He must show good faith by continuing to service the outstanding loan during the pendency of

the appeal. I further order that the appellants should ensure that this appeal is ready and fixed for hearing within the next 6 months and in default the order of injunction will automatically lapse .

Cost to abide the appeal

DATED AND DELIVERED THIS 20TH DAY OF MAY 2011

R.P.V WENDOH

JUDGE

PRESENT

Mr Litunda holding brief for Ogola for Applicant

Ms Wanjiru holding brief for Waiganjo for Respondent.

Court Clerk: Kennedy Oguma