



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 142 OF 2010

JEMUTAI LIMO::1ST PLAINTIFF
BENJAMIN LIMO::2ND PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION::::::::::::DEFENDANT

RULING

In their plaint filed in court on 15th October, 2010, the plaintiffs mainly claimed permanent orders of injunction restraining the defendant from attaching LR No. Uasin Gishu Ainabkoi/North/ 92 as well as chattels thereon pending the confirmation of a Grant of letters of Administration to **Cheruiyot Limo's** (deceased's) estate and for the taking of accounts to determine the balance outstanding to the defendant. The said parcel of land is registered in the name of the said deceased and the plaintiffs are suing as the legal representatives of his estate. The said title was charged in favour of the defendant for various sums advanced to the deceased.

It is pleaded in the plaint, *inter alia*, that the defendant on 17th September, 2010, issued a foreclosure notice against the estate of the said deceased before anyone had been appointed administrator thereof. Hence the declaration sought that the statutory notice and the entire process of service was null and void. The plaintiffs further seek the taking of accounts to determine the balance outstanding to date if any.

Simultaneously with the plaint, the plaintiffs filed an interlocutory application by way of Chamber Summons in which they sought a temporary injunction to restrain the defendant from disposing of, selling transferring or other dealing with said property pending the determination of the suit.

On the same date, the plaintiffs moved the court under a certificate of urgency for an interim interlocutory injunctive relief. An order restraining the defendant from disposing selling transferring or in any manner realizing the security and/or charge comprised in the said title was issued pending *interpartes* hearing. The *interpartes* hearing of the application was eventually scheduled for 19th January, 201. Come that date, counsel agreed to file written submissions.

In the interim the defendant had its replying affidavit filed and the plaintiffs filed supplementary affidavit in addition to their affidavit in support of the application.

The substance of the plaintiff's case, as can be gleaned from their pleadings, affidavits and submissions, is that the notice of foreclosure dated 17th September, 2010 issued by the defendant against the

administrators of the estate of the deceased was null and void as, by that time, no administrator had infact been appointed to administer the deceased's estate. The plaintiffs further contend that they have not been provided with the loan account and stand to suffer irreparable loss and damage which cannot be compensated by an award of damages unless the injunction is granted. They allege they will suffer such damage because the suit property is their only home to which they have sentimental attachment.

The gist of the opposition on the hard is that the deceased was indeed indebted to the defendant in various sums and offered the suit land as security for the same. He defaulted and defendant lawfully set in motion recovery proceedings in exercise of its statutory power of sale. The defendant contends that it served the statutory notice dated 17th September, 2010 upon the 2nd plaintiff and one **Robert Limo** who responded by making repayment proposals which were unacceptable to the defendant. On the plea that the suit land is of sentimental value the defendant contends that that cannot be the case given that the same was offered by the deceased as security which offer converted the security into a commodity for sale.

To my mind the plaintiff's application turns on whether the statutory notice was validly served. The same is dated 17th September, 2010. It is addressed to "Administrator(s) of the **Late Cheruiyot Arap Limo**" and is headed "Foreclosure Notice". An administrator, under the Law of Succession Act, means one to whom a Grant Representation has been issued. It is not disputed that as at 17th September, 2010 no one had been appointed an administrator of the estate of the **Late Cheruiyot Arap Limo**. The plaintiffs were issued with a grant of Letters of Administration ad Litem on 17th October, 2011. The grant was limited to the purpose of instituting a Civil Suit on behalf of the estate of the deceased.

The plaintiff therefore in Law, could only represent the estate of the deceased as from 7th October, 2010. In the premises, service of the statutory notice upon administrators of the **Late Arap Limo** on 17th September, 2011 could not be valid service upon the estate of the deceased. The service could not be validated by subsequent events such as the subsequent granting of letters of administration Ad Litem to the plaintiffs. That being my view of the matter, it follows that the defendant did not serve a valid statutory notice upon the estate of the deceased.

The indebtedness of the deceased to the defendant does not seem to be in dispute. What appears disputed is the level of indebtedness. The defendant's statutory power of sale has therefore clearly arisen in respect of the suit property. So, whereas the plaintiffs have made out a prima facie case with a probability of success at the trial with respect to failure to serve a valid statutory notice, they have not demonstrated that the estate of the deceased is not indebted to the defendant. In my view therefore there is no impediment to the defendant pursuing the exercise of its statutory power of sale before the hearing and determination of this suit.

In the result the orders of this court are that the applicants are granted a temporary injunction as prayed in paragraph (c) of the application but not pending the hearing and determination of this suit but subject to the defendant serving a fresh statutory notice.

As the plaintiffs are merely administrators of the estate of the deceased, they may not have been supplied with statements of the deceased's account. It is only proper therefore that as they settle the deceased's liabilities they be served with an up to date statement of account by the defendant. In the premises before servicing a fresh statutory notice of sale the defendant should furnish the plaintiffs with such an account.

In the end the plaintiff's application is allowed on the above conditions. The plaintiffs shall file separate undertakings as to damages within the next three (3) days.

Costs shall be in the cause.
Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 5TH DAY OF AUGUST, 2011**

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms. Sang H/B for Rotich for the Plaintiff and

Mr. Barasa H/B for Ngaira for the Defendant.

F. AZANGALALA

JUDGE

5TH AUGUST, 2011