



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO.489 OF 2004

**DAVID KIMATHI (Suing as the legal representative of the estate of)
REBECCA KIITHIRA
MWIREBUA.....PLAINTIFF/APPLICANT**

VERSUS

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....1ST
DEFENDANT/RESPONDENT
GARAM INVESTMENT LTD.....2ND
DEFENDANT/RESPONDENT**

RULING

The Applicant in the Chamber Summons dated 19th October 2010 seeks orders of this court to restrain the Respondent, either by themselves or through their agents, from charging, transferring, trespassing, evicting and/or in any way interfering with the applicants' quiet possession of L.R. No. NGONG TOWNSHIP/BLOCK 1/23 pending the hearing and determining this suit.

The Applicant, who has brought the action in his capacity of legal representative of the Estate of the registered owner of the suit land and the deceased Changor thereof, is making a further attempt to stop the sale of the said property by the Defendants in exercise of the 1st Defendant's power of sale under a charge dated 31st March 1998. An earlier attempt to stop a similar exercise by way of an injunction succeeded when, on 11th November 2004, the court (Azangalala J) held that a statutory notice served upon the deceased Chargor's daughter on 19th January 2004, at a time when the chargor had already died was not valid, and that the Applicant, having proved the possibility of being rendered homeless, had demonstrated irreparable loss.

The application was precipitated by the 2nd Defendant/Respondent's advertisement of 27th September 2010, appearing in the Daily Nation Newspaper, of its intended auctioning of the suit property, which the Applicant considers to be irregular, unlawful and void, for reasons that no auction notice had been served on the estate of the deceased. In all material particulars, the present application resembles the Notice of Motion of 6th September 2004, allowed by the Hon. Justice Azangalala with an order requiring the Applicant to file a written undertaking as to damages within 7 days of the order, which, as was observed by the Hon. Mr. Justice Waweru in yet another ruling herein, appears not to have been done. The Ruling by Waweru J, was in an application by the Defendant/Respondent to have the Plaintiff/Applicant ordered to make regular payments towards off-setting the loan account wherein the outstanding debt at the time was said to have stood at Kshs5,759,603.95 and continued to attract interest. The Respondent's application was disallowed on the ground that the deceased's legal representative was not the borrower, and only held a limited grant for the purposes of instituting this suit.

In the affidavit sworn by the applicant he depones to the fact that he obtained an injunction against the Respondent stopping the sale of the suit property on 8th September 2004 and that since no letters of administration have been obtained, he is, to use his words;

“not in a position to reorganize the estate of the deceased to offset the liabilities of the same, inclusive of the amount owed to the 1st Defendant.”

He also depones that he had entered into negotiations with the Respondent who had agreed that the estate could settle the debt by making a payment of Kshs5.2 million, only to be told by a friend, that the property had been advertised for sale by the 2nd Defendant/Respondent. He depones also that he has never been given any notice to sell the property as required by law and was afraid that following the advertisement of 27th September 2010, the 2nd Defendant/Respondent may have proceeded to sell auction the suit property.

The application is opposed on the strength of a comprehensive affidavit sworn by the Debt Recovering Manager of the 1st Defendant/Respondent to which are annexed several documents detailing the negotiations that have taken place between the Applicant and the 1st Respondent since the passing away of the Chargor, particularly during the year 2010, immediately prior to the event leading to this application.

The correspondence and documentation exhibited by the Respondent shows quite clearly that the Applicant was served with a three month statutory notice at the suit premises on 19th February 2010, leading to vigorous efforts by the applicant and his sibilings to renegotiate the loan and agree on terms of repayment. I find no ground to fault the affidavit of service sworn by Zephania Kipro Rono on 19th February 2010, annexed to the 1st Respondent's Replying Affidavit, in view of the letter of 20th February 2010 (annexture “PK 2” of the Replying Affidavit) written to the 1st respondent by the Applicant, his sister and brother.

The Statutory Notice of 19th February 2010 was issued following the lifting of the injunctive orders of 11th November 2004, by Hon. Mr. Justice Kimaru on 2nd July 2008, when the court declared that the Respondent was at liberty to exercise its power of sale after issuing the requisite statutory and redemption notices. The lifting of the said orders was brought to the parties' attention by this court on 1st October 2010.

From the time of the Applicants' letter of 20th February 2010, up until the time the property was advertised on 13th September 2010, the parties had renegotiated the loan, with the Respondent discounting the same to Kshs 5.2, on the basis of the applicant's intimation that the estate had raised some Kshs.2 million which it was ready to pay towards the outstandings. In consideration of the offers made towards settlement, the estate was asked to remit the sum of Kshs. 2 million, and to pay the attendant valuation and legal fees and also settle the auctioneer's charges directly to the, **"to facilitate the suspension of the auction."** From the letter of 24th September 2010, vide which the above was communicated, it is clear that the Applicants had acknowledged the auction notice and were aware of the imminent sale, scheduled as per the auction notice they claim was not served. An auctioneers' notice of 45 days had been served upon them as is seen from annexure "PK4" of the Replying Affidavit. The Respondents have demonstrated that the property has already been sold.

It is quite clear from the above that the court is being asked to act in vain and that the Applicant is guilty of material nondisclosure. From the moment the subjt property was charged to the 1st Respondent, it became a commodity for sale in the event that the charger defaulted in meeting her obligations under the Charge. Unfortunately as it is that she fell ill and eventually died, the record shows that she started defaulting in the repayment of the loan prior to her demise in 2003. Her personal representative and heirs have been accommodation to redeem the property for over a long period but they appear to have squandered the opportunity accorded to them.

The charge document, having stated that the Charge was made between **"Rebecca Kithiira Mwirebua of P.O. Box 66426 Nairobi (hereinafter called "the Chargor" which expression where the context so admits include his (sic) successors, personal representatives and assigns) on the one part,"** the Applciant ought to have moved with speed to obtain letters of administration of the estate, over and above the limited grant in order to properly challenge the exercise of the power of sale. Instead, he seems to be using his failure to take out letters of administration as both a shield and a sword to the detriment of the Respondent.

The 1st Respondent has bent backwards over the years to accommodate the applicant who, in my view has neither established a prima facie case against the Respondents nor demonstrated any irreparable loss in the view of the obvious and prolonged default as per the Charge instrument.

For the above reasons therefore, I find the Chamber Summons dated 19th October 2010, to be an abuse of the process of the court. The same is hereby dismissed, and the costs thereof ordered to be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH day of OCTOBER, 2011

M. G. MUGO
JUDGE

In the presence of:

Mr. Matheka holding brief for J. Kinyanjui
No Appearance

For the Applicant
For the Respondent