



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 250 OF 2011

FRANCIS AMULIOTO HOSEA SAKWA.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT/RESPONDENT
MUGANDA WASULWA t/a KEYSIAN AUCTIONEERS....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff's application dated 21st June, 2011 seeks the following orders:

- “1. This honourable court be pleased to grant a temporary order of injunction restraining the defendants herein their agents, servants from offering for selling, disposing, alienating the applicants land title LR NO. KAJIADO/KAPUTIEI-NORTH/27131 HOUSE NO. 28 situate at HILL-VIEW ESTATE by way of public auction on the 12th July 2011 or any other date pending hearing and determination of this application.**
- 2. This honourable court be pleased to order the 1st defendant/respondent to release to the applicant the statement of the loan account as at todate and balance thereof if any.**
- 3. Costs of this application be provided for.”**

The supporting affidavit sworn by the plaintiff states, *inter alia*, that sometimes in June 2009 the plaintiff applied for a mortgage from Savings and Loan (K) Limited, a subsidiary of the Kenya Commercial Bank Limited for **Kshs.3,510,000/=**. The plaintiff charged his property known as **LR No. KAPUTIEI-NORTH/27131**, hereinafter referred to as **“the suit property”**, to secure repayment of the aforesaid sum. He further alleged that he had so far repaid a sum of **Kshs.1,022,375/=** and is still paying the balance by monthly installments. However, on 13th May, 2011 the plaintiff received a notification of sale of the suit property from the 2nd respondent. The notice indicated that the suit property was due to be sold by public auction on 12th July, 2011.

The plaintiff contended that no statutory notice had been served upon him and therefore the intended sale of the suit property was unlawful.

In response, the 1st defendant filed a replying affidavit that was sworn by **Kennedy Kasamba**, its Relationship Manager. He confirmed that the plaintiff had charged the suit property to the 1st defendant as stated in the plaintiff's affidavit. The monthly repayments were agreed at **Kshs.58,448/=** but the plaintiff fell into arrears almost immediately after securing the mortgage facility. The plaintiff has been making erratic payments which are below the agreed monthly repayment. The balance of the loan as at June, 2011 was **Kshs.3,302,446.03**. A copy of the statement of account as at June 2011 was annexed to the 1st defendant's affidavit.

The 1st defendant stated that a statutory notice was sent to the plaintiff on 2nd June, 2010. The same was sent by way of registered post using **postal address number 16233-00610**. That is the same postal address quoted by the plaintiff in his affidavit. A copy of the notice was annexed to the 1st defendant's application. In May, 2011 the 2nd defendant was instructed to sell the suit property by way of public auction in exercise of the bank's statutory right of sale.

With regard to the plaintiff's prayer to be furnished with statements of the loan account, the 1st defendant stated that it has never refused to do so.

On 9th November, 2011 the plaintiff was granted leave to file an affidavit as well as submission within seven (7) days from the said date but none has so far been filed. The defendants were also directed to file their submissions within seven (7) days of service of the plaintiff's submissions. The defendants have not complied with the said directive.

I have considered the affidavits. The plaintiff's contention is that he has been servicing his mortgage account without any default. However, from the statement of account annexed to the 1st defendant's affidavit it is clear that the plaintiff has consistently been in arrears of the loan repayment. It is clear to the court that the plaintiff is far from being upto date in his repayments.

Secondly, the plaintiff contends that no statutory notice was served upon him before the 2nd defendant proceeded to issue a notification of sale of the suit property. That is not correct. The 1st defendant sent to the plaintiff a statutory notice by way of registered post. In the aforesaid circumstances the plaintiff cannot blame the 1st defendant for exercising its statutory power of sale.

The tests for grant of an interlocutory injunction as set in **GIELLA v CASSMAN BROWN [1973] EA 358** are well known. The plaintiff has not satisfied this court that he has a prima facie case with a likelihood of success and that he stands to suffer irreparable loss unless the orders sought are granted. I find no merit in the plaintiff's application and dismiss the same with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:
Muriithi – Court Clerk
Miss Kamau for the Respondent
No appearance for the Applicant