



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 519 of 2009**

**JOSEPH WACHIRA WAMURU.....PLAINTIFF**

**VERSUS**

**SAVINGS & LOAN (K) LTD.....DEFENDANT**

**RULING**

The plaintiff filed suit against the defendant seeks orders, *inter alia*, that the intended sale by the defendant of the plaintiff's property known as LR No. Ruiru/Ruiru/KIU/Block 5/2653 (*hereinafter referred to as the suit property*) be declared invalid, unlawful, oppressive, illegal, null and void. Contemporaneous with filing suit, the plaintiff filed an application pursuant to provisions of **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules** seeking court's orders to temporarily restrain the defendant either by itself, its servants or agents from selling or disposing of the suit property pending the hearing and determination of the suit.

The grounds in support of the application are stated on the face of the application. The plaintiff states that he was not served with any valid statutory notice of sale before the suit property was offered for sale by the defendant. The plaintiff further contends that the auctioneers failed to serve him with the requisite forty five (45) days redemption notice before the property was advertised for sale. The plaintiff further argues that no valuation of the suit property was done before the property was offered for sale. The plaintiff took issue with the manner in which the defendant applied interest on the loan account. According to him, the defendant charged an unlawful rate of interest that was contrary to the **Banking Act** and the **Central Bank of Kenya Act**. The plaintiff pleaded estoppel against the defendant. The plaintiff contends that the defendant had accepted to negotiate the rescheduling of the repayment of the loan and could not therefore purport to offer the property for sale in light of the ongoing negotiations. The plaintiff was of the view that the defendant had acted in bad faith in purporting to sell the suit property, which according to him, was a deliberate effort by the defendant to frustrate and deny the plaintiff an opportunity to redeem the property. The plaintiff urged the court to grant the order sought in order to preserve the suit property and prevent him from suffering irreparable loss and damage. The plaintiff argued that if the injunction is not granted, the plaintiff would be denied opportunity to call upon the defendant to account for the payments that it had received in respect of the advanced loan. The application is supported by the annexed affidavit of Joseph Wachira Wamuri, the plaintiff. He swore a supplementary affidavit in further support of the application.

The application is opposed. Joseph Kilei, the defendant's Thika Branch manager swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiff had in 2004 been granted a loan facility of KShs.4 million which was secured by a charge over the suit property. He swore that, in breach of the fundamental terms of the charge, the plaintiff defaulted in repaying the agreed monthly installments thus compelling the defendant to exercise its statutory power of sale by seeking to sell the security in a bid to recover the sum advanced together with the accrued interest. He denied that the defendant had charged the plaintiff interest other than what was provided for in the instrument of charge and which, in any event, was not contrary to the law. He deponed that prior to the defendant advertising the suit property for sale, it had unsuccessfully engaged the plaintiff with a view to securing the plaintiff's cooperation in the repayment of the loan amount together with the accrued interest. He swore that the defendant duly served the plaintiff with the requisite statutory notice and the redemption notice prior to advertising the suit property for

sale. He denied the allegations by the plaintiff to the effect that the defendant had agreed to suspend the sale during a supposed out of court negotiation. He deponed that the defendant should be allowed to proceed with the sale of the charged property in view of the fact that the plaintiff had failed to repay the loan that was advanced to him. He further deponed that the defendant had acted within the terms of the law in seeking to realize its security in light of the default in the repayment of the sum advanced to the plaintiff. He was of the view that the basis of the plaintiff's case was deliberate falsehoods and misrepresentations which had no connection with reality. He urged the court to dismiss the application with costs.

Prior to the hearing of the application, counsel for the parties to this application, i.e. Mr. Milimo for the plaintiff and Mr. Mutua for the defendant, agreed by consent to file written submissions in support of their respective clients' cases. The said counsel duly filed the written submissions, including the authorities that each counsel relied on in support of the respective cases of their clients. At the hearing of the case, I heard brief submissions made by Mr. Milimo for the plaintiff and by Mr. Mutua for the defendant. The two counsel basically relied on the written submissions. The issue for determination by this court is whether the plaintiff established a case to entitle this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the application sought are that the plaintiff must establish a *prima facie* case with a likelihood of success. The plaintiff must also establish that he would suffer irreparable damage that will not likely be compensated by an award of damages. In the unlikely event that the court shall be in doubt, it shall determine the case on a balance of convenience (see Giella vs. Cassman Brown [1973] EA 358).

In the present application, the plaintiff raised several issues for consideration by this court in determining whether or not a *prima facie* case has been established. As correctly pointed out by Mr. Mutua, the plaintiff did not challenge the validity of the charge in his pleadings. Therefore, this court does not have jurisdiction to consider an issue which has only been raised in the submissions without being backed by pleadings. The court will therefore ignore the submissions made on behalf of the plaintiff in regard to whether or not the charge that forms the basis of the relationship between the plaintiff and the defendant is valid. In the absence of any pleadings challenging the validity of the instrument of charge, this court can assume, and correctly so, on the basis of the filed pleadings, that the said charge is indeed valid.

As regards whether the defendant had issued the requisite statutory notice before the suit property was advertised for sale, it was the plaintiff's contention that he was not served with either the statutory notice or the redemption notice. The plaintiff challenged the defendant's assertion that it had served the statutory notice via the plaintiff's postal address as disclosed in the instrument of charge. The plaintiff took issue with the documents exhibited by the defendant in support of its contention that it had served the statutory notice. In response to the plaintiff's claim in regard to service, the defendant annexed a copy of a statutory notice which it issued to the plaintiff through postal address No. 646 – 00618, Nairobi. The statutory notice is dated 14<sup>th</sup> October 2008. It alludes to an earlier notice issued to the plaintiff on 20<sup>th</sup> December 2006. The statutory notice gave the plaintiff three (3) months notice to redeem the property by repaying the then outstanding sum of KShs.4,736,274/= as at 30<sup>th</sup> September 2008 or in default thereof the defendant would proceed to realize the security. The notice was sent by registered post on 17<sup>th</sup> October 2008. According to the annexed schedule, the letter was registered as No.1533867 and was sent to the plaintiff's postal address referred above. The plaintiff has not denied that the postal address in question does not belong to him.

Having evaluated competing evidence as regards the service of the statutory notice, I am satisfied that the defendant indeed served the statutory notice by registered post to the plaintiff. The said statutory notice is substantially in compliance with the requirements of **Section 74** of the **Registered Land Act**. I similarly hold that the redemption notice sent to the plaintiff by registered post by Messrs Watts Enterprises, an auctioneering firm duly instructed by the defendant, was properly and validly served upon the plaintiff. The redemption notice dated 20<sup>th</sup> May 2009 was sent by registered post on 23<sup>rd</sup> May 2009 through the plaintiff's postal address. I therefore find no merit with the plaintiff's argument that he was not served with the statutory notice as contemplated by the law before the defendant sought to exercise its statutory power of sale.

As regard the plaintiff's complaint to the effect that the suit property had not been valued before the same was offered for sale by the defendant in the said exercise of its statutory power of sale, the defendant annexed a copy of a valuation report prepared by Messrs Centenary Valuers & Property Consultant in the replying affidavit sworn by Joseph Kilei. The suit property was valued on 22<sup>nd</sup> July 2009. The valuation was therefore undertaken well within the one year period that the defendant is required to undertake such valuation with a view to determining the forced sale value of the property to be sold. The plaintiff's complaint in that regard therefore is baseless.

The plaintiff further complained that the defendant had charged a rate of interest that was exorbitant and uncontractual. The plaintiff made this complaint both in his plaint and in the supporting affidavit. He did not attach any document to support his assertion that the defendant had charged a rate of interest other than that which was agreed when the loan facility was extended to him. Neither did the plaintiff provide any evidence in the nature of documentary evidence to support his claim that he had entered into negotiations with the defendant which had resulted in the defendant agreeing to reschedule the loan. What was apparent from the documents exhibited in both affidavits sworn on behalf of the plaintiff and on behalf of the defendant is that the plaintiff appears to have borrowed the money and then soon thereafter defaulted in repaying the same. The plaintiff made erratic repayments which were not in accordance with the agreement he had entered into with the defendant. In the circumstances therefore, the defendant established that the plaintiff has been in persistent default to an extent that it had no choice but to resort to the option availed to it under the instrument of charge, that is, to exercise its statutory power of sale by realizing the security charged to it.

From the above reasons, it is evident that the plaintiff failed to establish a prima facie case as to entitle this court to grant him the orders of interlocutory injunction sought in his application. The grounds put forward by the plaintiff in support of his application are not sufficient to disentitle the defendant from the right to exercise its statutory power of sale as is available to it under the instrument of charge. The application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY 2010.

**L. KIMARU**

**JUDGE**