



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

**Civil Case 69 of 2008**

**KORA CONSTRUCTION COMPANY ..... 1<sup>ST</sup> PLAINTIFF  
JACKSON MUTIMBA LUTTA ..... 2<sup>ND</sup> PLAINTIFF  
EUNICE VIHENDA DANGANA ..... 3<sup>RD</sup> PLAINTIFF**

**V E R S U S**

**THE CO-OPERATIVE BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT  
DUNCAN KINYANJUI WANJU  
T/A DOLPHIN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

In the applications dated 16<sup>th</sup> October, 2008 the plaintiffs are seeking orders that pending the hearing and final determination of this suit the defendants by themselves, their servants and or agents or any other person claiming through them be restrained by way of temporary injunction from selling, offering for sale, alienating or in any other way whatsoever dealing with land parcel Nos. **ISUKHA.LUBAO/705 & 2105** respectively. The application is supported by the affidavits of the 2<sup>nd</sup> plaintiff sworn on 15<sup>th</sup> October 2008.

Mr. Ombaye, counsel for the applicants submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are the joint proprietors of plot No.**2105** and the 2<sup>nd</sup> plaintiff is the sole proprietor of plot no.705. Counsel submitted that the two parcels of land were offered as security for a loan by the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff has been servicing the loan but a dispute arose on charges and penalties imposed by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has resorted to selling the charged properties yet the plaintiffs were not served with a three months statutory notice as per **section 65** and **74** of the Registered Land Act.

Counsel for the applicants further submitted that the 2<sup>nd</sup> defendant intends to sell the charged properties and purported to have issued notification of sale yet he has not complied with the law. A forty five days redemption notice was not issued to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs contrary to rule 15 of the Auctioneers 1987 rules which requires auctioneers to give 45 days notice to owners of properties. The notice purportedly issued is not valid as it is not addressed to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs as owners of the property, and that it does not contain their names. The notice indicate that the 1<sup>st</sup> plaintiff is the owner which is not correct. The parcel numbers are not contained on the notices. Counsel urged the court to declare the redemption notice invalid.

It was also submitted on behalf of the applicants that the charge documents is void in law because it does not contain a special acknowledgement that before signing the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs understood the effect of **section 74** of the Registered Land Act as required by **section 65** of the same Act. The plaintiffs will suffer loss if the orders sought are not granted.

Mr. Ocharo counsel for the defendants opposed the application and relied on the affidavit of Samuel Kanyeki. Counsel submitted that the 1<sup>st</sup> plaintiff breached the charge by not servicing the loan and the statutory powers of sale crystallized. Counsel contends that the applicants do not have a prima facie case. The plaintiffs were served with a 3 months notice by way of registered post through the postal address indicated in the charge documents and this is the same address which is reflected the documents filed by the plaintiffs in court. The dispute on charges and interest cannot

be the basis for issuing an injunction. The 45 days redemption notice issued by the 2<sup>nd</sup> defendant are valid as the plaintiffs do not deny that they received the notice and the notification of sale. The notification of sale urged the 2<sup>nd</sup> and 3<sup>rd</sup> defendant to pay the debt within 45 days otherwise their properties would have been sold. It was only after the expiry of the 45 days period that the 1<sup>st</sup> defendant would have advertised the properties for sale.

On the issue relating to whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants understood the effects of **section 74** and **79** of the Registered Land Act counsel submitted that **clause 15** of the charge document explains that fact. A certificate by an attesting advocate is also part of the charge documents. No prima facie case has been established. Counsel relied on the case of **EAST AFRICA DEVELOPMENT BANK V. HYUNDAI MOTORS (K) LTD. CIVIL APPEAL NO.194 OF 204 NAR CIVIL APPEAL** and that of **GIELLA V CASSMAN BROWN & COMPANY LTD. 1973 E.A. 358**.

The main issues of determination here are whether a valid statutory notice was issued and served upon the plaintiffs, whether a valid 45 days redemption notice was issued, whether **section 65, 74** and **79** of the Registered Land Act were complied with and finally whether the plaintiffs have a prima facie case with a probability of success.

The plaintiffs contend that no 3 months statutory notice was issued by the 1<sup>st</sup> defendant. **Section 74** of the Registered Land Act empowers a charge to issue should the chargor default in payment of the loaned amount and if the chargor fails to settle the amount in default, the chargee is further allowed to sell the charged after the expiry of three months.

The 1<sup>st</sup> plaintiff admits having borrowed KShs.3.5 million from the 1<sup>st</sup> respondent and contends that he has been paying the loan. They requested for bank statements but the 1<sup>st</sup> defendant failed to do so. Annexure SKK 3 to the replying affidavit is a letter dated 16<sup>th</sup> May, 2008 notifying the 1<sup>st</sup> plaintiff that its account was in arrears. Annexure SKK 4(a) is a letter dated 27<sup>th</sup> May, 2008 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff giving three (3) months notice to pay the outstanding amount of **KShs.3,806,821.45**. The 1<sup>st</sup> defendant has also annexed a list of registered postal mail that include the letter to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff.

From the above documents, it is clear that the 1<sup>st</sup> defendant issued the statutory 3 months notice. The address used by the 1<sup>st</sup> defendant to send the notice is the same address indicated in the charge document drawn on 27<sup>th</sup> July 2007 as well as in the guarantee documents exhibited by the plaintiff. I do find that a proper notice was duly served upon the plaintiffs.

The next issue is whether the 2<sup>nd</sup> defendant issued a valid 45 days redemption notice. Rule **15 (d)** of the 1997 Auctioneers Rules requires auctioneers when dealing with immovable property and upon receipt of instructions to sell such property to **“give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instructions.”**

Upon the expiry of the **45** days notice, the auctioneer is supposed to advertise the property for sale and at least **14** days should lapse after the date of the advertisement. The plaintiff contend that no such notice was given and that the purported notices were invalid.

Under the provisions of **rule 15**, both the notification of sale and the redemption notice must be served upon the owner of the property. The 2<sup>nd</sup> defendant issued a notice titled **“45 Days Redemption Notice.”** The notice is dated 17<sup>th</sup> September, 2008 and the outstanding amount is indicated as **KShs.3,488,491.90**. He also prepared a notification of sale as per the requirements of **rule 15 (b)** indicating the owner of the property and the principal debtor. The notification of sale is also dated 17<sup>th</sup> September, 2008. Annexed to the notification of sale is a schedule showing the particulars of the two charged properties. The plaintiffs’ contention is that the **45** days redemption notice does not give the names of the owners but simply indicates the name of the 1<sup>st</sup> plaintiff who is not the owner. Under **rule 15** of the Auctioneers Act, it is not provided that the auctioneer’s redemption notice must be addressed to the owner of the property. the requirement is to give in writing a **45** days redemption notice. The notice herein indicate who the principal debtor was. The notification of sale that was accompanied with the redemption notice indicate who the principal debtor is and the registered owner of the property. the Black’s Law Dictionary defines a notice as –

*Information: the result of observation ----- knowledge of the existence of a fact or state of affairs. Notice is knowledge of facts which would naturally lead an honest and prudent person to make inquiry-----!!*

The plaintiffs do not dispute the fact that they got the notices. The pleadings of the plaintiff indicate that the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to auction the charged properties. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were aware of the existence of the charge against their properties. The **45** days notice is intended to give the owner of charged properties time to pay of the loan or even negotiate with the chargees on how they intend to repay the loan. I do find that both the

45 days redemption notice and the notification of sale were valid and were properly served upon the plaintiffs. Indeed the two documents are annexed to the plaintiffs supporting affidavit and are the ones that prompted the filing of this suit.

The plaintiffs are contending that the charge document is void in law be it does not contain a special acknowledgement by the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs that they understand the effects of **section 74** of the Registered Land Act as required by **section 65** thereof. Clause 15 of the charge documents provides as follows:-

*We the above named chargor hereby acknowledge that we understand the effect of Section 74 and 79 of the Registered Land Act and we hereby agree that the Lender may exercise its statutory powers of sale and appointment of a Receiver with such express variations and additions as contained in this Charge.*

The above clause is followed by the signatures of the chargers and a certificate by Ocharo Kabira Advocate. The identity card numbers of the chargers are indicated in the certificate. Section 65 of the Registered Land Act requires a **special acknowledgement that the** chargor understands the effect of section 74 thereof and the acknowledgment shall be signed by the chargor. Clause 15 of the charge document is quite clear and I do find that the charge documents are valid.

The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs charged plot numbers **ISUKHA/LUBAO/705** and **2105** to enable the 1<sup>st</sup> plaintiff access loan facilities. The 1<sup>st</sup> defendant advanced a loan facility of **KShs.3,500,000/=** to the 1<sup>st</sup> plaintiff. It's not in dispute that the 1<sup>st</sup> plaintiff received the loan facility. The 1<sup>st</sup> plaintiff's intention is that it called for statements of accounts that were not given and that there is dispute on some charges levied by the 1<sup>st</sup> plaintiff. The loan was secured after the registration of the charge on 16<sup>th</sup> August, 2007. Before the expiry of one year the borrower had fallen into arrears and notices were issued. Any dispute on the charges or interest levied cannot be the basis of a prima facie case. The chargers knew the effect of the default. The plaintiffs have not annexed deposit slips to prove that they had fully paid the loan or that what is being claimed is unfounded. The value of a charged property can be ascertained and the plaintiffs cannot contend that they will suffer irreparable damage. Unless a chargor fully repays a loan, a charged property will always be at the risk of being auctioned.

In the end, I do find that the application herein lacks merit and the same is dismissed with costs to the respondents.

**SAID J. CHITEMBWE**  
**J U D G E**

***Delivered, Dated and counter-signed at Kakamega this 15<sup>th</sup> day of April, 2010***

**ISAAC LENAOLA**  
**J U D G E**