



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 597 of 2008

SAMSON ALITON OKELLO.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The Applicant has filed a Chamber summons application dated 13th October, 2008 under Order XXXIX rules 1, 3, 5 and 9, and XIX rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking five prayers as follows:

1. That this application be certified as urgent service be dispensed with and heard ex parte in the 1st instance.
2. That this honourable Court be pleased to issue an order of temporary injunction restraining the Defendant, its agents, servants, and/or employees from selling, alienating, disposing and/in any way dealing with the Plaintiff's properties known as NAIROBI/BLOCK 82/3857 DOONHOLM PHASE V ESTATE pending the interparties hearing of this application.
3. That this honourable Court be pleased to issue an order of temporary injunction restraining the Defendant, its agents, servants, and/or employees from selling, alienating, disposing and/in any way dealing with the Plaintiff's properties known as NAIROBI/BLOCK 82/3857 DOONHOLM PHASE V ESTATE pending the hearing and determination of this suit.
4. That this Honourable Court be pleased to issue an order for the Defendant to render the proper accounts with necessary inquires and directions in regard to the House loan.
5. That costs be in the cause.

Prayer 1 and 2 are spent.

The application is supported by an affidavit sworn by Samson Aliton Okello on 13th October, 2008 and a further affidavit dated 26th November, 2008. I have considered both affidavits and the annexures thereto

This application was opposed. There is a replying affidavit sworn by Purity Raaria the Legal Officer for the Defendant bank and annexures thereto dated 11th November, 2008. I have considered the content of that affidavit.

The Applicant seeks an injunction to restrain the Defendant from exercising its statutory power of sale

over the suit property. The basis upon which the application is made has been cited on the face of the Chamber Summons. In summary, the Plaintiff contends that the demand notice issued by the Defendant bank was contrary to The Registered Land Act, Cap 300. In his submissions Mr. Ojienda for the Applicant seems to have abandoned that ground and argued instead, that the Defendant did not comply with the Auctioneers Rules and that no Notification of Sale and no Redemption Notice were ever served upon the Plaintiff.

In reply to that contention, Mrs. Karanja for the Defendant bank submitted that the Auctioneers Rules specifically rule 15 were fully complied with. The relevant step taken by the Auctioneer are demonstrated by the copies of Notification of Sale, the 45 days Redemption Notice and the certificate all issued by the Auctioneer in compliance with rule 15(a) of the Auctioneers Rules (1997). They are marked 'PR4' in the replying affidavit.

I have examined the various notices marked 'PR4' and I am satisfied that the Plaintiff was served with the requisite notices in compliance to the Auctioneers Rules. There is therefore no merit in the Plaintiff's complaint that the Auctioneers Rules were not complied with. The other ground relied upon by the Plaintiff has to do with accounts. According to the submissions by Mr. Ojienda, the Plaintiff is questioning the failure by the Respondent to reflect payments made by the Plaintiff into his loan account between 16th December, 2004 and May 2005. The Plaintiff also challenges the interest amount charged on the loan and he contends that the interest charged is exorbitant and was contrary to the agreement that was reached between the parties.

Mrs. Karanja on her part submitted that disputes as to the amount owing is not a ground to injunct a mortgagee from exercising its statutory power of sale. For that proposition counsel has relied on the case of Michael Achieng' Aoko vs. Barclays Bank of Kenya HCC No. 176 of 2002. In the cited case, Ringera, J. (as he then was) stated that it was a long established principle of law that a dispute as to the amount due is not a ground for injuncting the mortgagee from exercising its statutory power of sale.

Mr. Ojienda did not respond to the authority cited by Mrs. Karanja, neither did he say anything in reply to the principle of law relied upon. I do not wish to add more to that principle except to say that in the instant case, one of the grounds upon which this application is based is that the amounts claimed by the Defendant are excessive and need to be recalculated. With due respect to Mr. Ojienda, that is a dispute as to the accounts and cannot be a basis upon which the injunction sought can be issued.

The other ground relied upon by Mr. Ojienda is that section 44(a) of the Banking Act had been flouted. That section restrains the bank from recovering more than double the amount of the loan from the date the loan becomes non-performing. Mr. Ojienda argues that according to the statement of account, the Plaintiff's known account was closed in 2004. Mr. Ojienda argues that this issue should be dealt with at the trial in order to prevent the Defendant from recovering more money than are due to it. Mrs. Karanja on her part referred the court to paragraph 5, 8 and 9 of the supporting affidavit where the Plaintiff admits the debt to the extent of 1.8 million and where he admits that for the last 3 years he has not made any payment towards the loan. Counsel has relied on the case of Kunguru vs. Kenya Commercial Bank, Milimani HCCC 1543 of 2000 for the proposition that an injunction cannot issue where there is a debt, a default, and where a statutory notice has been served.

As is evident from the proceedings before the court, the Plaintiff/Applicant obtained an interim injunction on condition that he pays Kshs.500,000 to the Respondent within 21 days from the 14th October, 2008 and on condition that subsequently he would continue paying monthly installments in the sum of Kshs.50,000/-. The Plaintiff breached the terms upon which the injunction was granted as a consequence of which the injunction orders lapsed. An injunction is an equitable remedy and a party seeking such a remedy must conduct himself in relation to the suit and the matter at hand in a manner that will meet the approval of a court of equity. The Plaintiff's conduct has not met the approval of this court. He has failed to comply with the orders which were terms of a consent reached between him and the Defendant. It is evident from the facts of this case that the Plaintiff was in default of payment continuously for a period of 3 years. The Plaintiff has not made any payment since he filed this case in court on 13th October, 2008. I find that the Plaintiff has not met the conditions upon which an injunction can be

granted to stop the Defendant from exercising its power of sale.

This analysis leads me to the following orders:

1. The Plaintiff's application dated 13th October, 2008 be and is hereby dismissed.
2. The Plaintiff will pay the costs of the application

Dated at Nairobi this 30th day of January 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Ms. Busenei holding brief Mr. Ojienda for the Plaintiff/Applicant

Mrs. Karanja for the Defendant/Respondent

LESIIT, J.

JUDGE