



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 483 of 2008**

**AGNES MURUGI MWANGI .....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD. ....DEFENDANT**

**RULING**

Application dated 26/8/08 by Chamber Summons seeking orders of temporary injunction restraining the defendant from selling or disposing of the property Ngong/Ngong/20523 whether by Public Auction or Private Treaty pending determination of this court.

On the grounds that the sale has been advertised but the defendant has never served any valid statutory notice under **Section 74, Registered Land Act**. The defendants' advocates gave only 10 days' notice by a letter dated 14<sup>th</sup> May 2008. Furthermore, no Land Control Consent was obtained prior to registration of the charge and further charge therefore, the charge and further charge are void and unenforceable.

The charge instruments are invalid for non compliance with provisions of **Section 110 of Registered Land Act** and the documents were never explained to the chargor/applicant. Furthermore, **Section 39 of the Central Bank Act** and **Section 44 Banking Act** were complied applied with and therefore interest applied by defendant to the account of the applicant is illegal.

The supporting affidavit sworn by the applicant shows that the applicant was in the employment of the defendant at the material time and she applied for financial assistance. She gave security- a charge Ngong/Ngong/20523, her property. She swears that no consent of Land Control Board was obtained as required by law.

Further, all members of staff used to get loan facilities at concessionary rates of interest but her rate of interest was varied without obtaining approval of the Minister as required under **Section 44 of Banking Act**.

In July 2008, the defendant was claiming Shs.1,070,874.85 and she was given 10 days within which to pay or else her said property would be sold. The Notification of Sale dated 7/7/08 was demanding Kshs.1,388,271/= and sale was scheduled for 9/9/2008 at 11.00 a.m.

Notwithstanding what the applicant says, it is exhibited by the defendant a consent obtained from the relevant Land Control Board dated 8/6/2004 and another 18/1/2000, in respect of the charges aforementioned. Exhibit 2 (b) is a letter dated 26/3/2008 addressed to applicant and dispatched by registered post. This letter made demand for payment and threatened the exercise of chargee power of sale unless

payment is made within Three (3) months from the date of notice.

A perusal of the charge does not disclose anywhere that the right of the chargee (defendant) to sell shall be exercised if default is made. The certificate under **Section 110** does not relate to the exercise of power of sale by chargee. It relates to the identity of the chargor and chargee. The part “and understood its contents” does not relate to the power of sale by chargee. Whether the chargee has power of sale of its security is in question and therefore the validity of the security documents.

The applicant’s counsel has cited some authorities. The decision of Court of Appeal in **Civil Appeal No.39 of 2002** where it was held that the power of court in granting an interlocutory injunction is discretionary and the Court of Appeal can only interfere under the circumstances set out in Holding No.2.

The Court of Appeal reiterated the principles to be observed in granting interlocutory injunction as stated in the Holding No.3.

Holding No.4 the court held that a prima facie case in a civil suit includes but is not confined to a “genuine and arguable case.”

It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

The second authority is the decision again of Court of Appeal in **Civil Appeal No.61 of 2000 – Trust Bank Ltd. vs. Kiram Ranji Kotedia**. In this case there was an ex parte order granted and before hearing inter partes there was additional documents showing another state of circumstances.

Also in that appeal the court discussed the issue of service of a valid statutory notice and the manner of service. In that case the court found there was no evidence that the Notice sent under Certificate of Service through the post was proper service. The court found that a prima facie case had been made out saying that the appellants’ statutory power of sale had not accrued because that power is only exercisable after a valid notice of sale has been given. That case was under the Transfer of Property Act.

The third case was a High Court decision in **HCC No.589 of 1977** whereby the court held that sale was void for all purposes because the Land Control Board had not given its consent to the sale within 3 months of the agreement.

In the present case the first charge registered on 21/10/97 the earliest consent was dated 18/1/2000 and the further charge was registered on 17/2/2000 and the other consent was given on 8/6/2004. It therefore appears that the consents were obtained very much after the charges were made and therefore the consents may not be valid.

On the issue of statutory notice, a close examination will show that 3 months’ notice was sent by registered mail on 26/3/2008 and before expiry of 3 months, on 14/5/08 a further notice of 10 days was issued by the defendant’s advocate and sent to the applicant.

The auctioneers issued a Notification of Sale on 1/7/2008. This suit was therefore filed on 26/8/2008. It is my observation that the notices issued by defendant were not lawful and in view of the authorities above, I am satisfied and I have come to the conclusion that there exists a right which has apparently been infringed by the defendant.

A prima facie case has been demonstrated. Regarding the issue of compensation by way of damages, it is obvious where the applicant’s right has been breached no amount of damages can console for loss of land. I find the balance of convenience leans on the side of the applicant who is in possession of prime residential property in Ngong.

I therefore allow application and grant orders sought under prayer 2 and 3 with costs to the applicant.

It is so ordered.

**DATED** and **DELIVERED** this 26<sup>th</sup> day of January 2009.

**JOYCE N. KHAMINWA**

**JUDGE**