



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

Civil Suit 208 of 2001

EMMANUEL WENANI T/A NAMAROME ENTERPRISES.....PLAINTIFF

VERSUS

KENYA COMMERCIAL FINANCE CO. LTD.....DEFENDANT

RULING

This is a Chamber Summons application dated 5th December, 2008 brought under Order 39 rules 1, 2 and 3 of the Civil Procedure Rules. It seeks the following orders:

1. **THAT pending and hearing and determination of this application, an injunction be and is hereby issued restraining the 1st Defendant from selling by public action or private treaty or in any other manner whatsoever and howsoever from interfering with the 2nd Plaintiff's interest in land Title No. Eldoret Municipality/Block 14/638.**
2. **That pending the hearing and determination of the substantive suit, an injunction be and is hereby issued restraining the 1st Defendant from selling by public auction or private treaty or in any other manner whatsoever and howsoever from interfering with the 2nd Plaintiff's interest in Land Title No. Eldoret Municipality/Block 14/638.**
3. **That the costs of this application be provided for.**

The application is based on the following grounds

- a) **The 1st Defendant has purported to issue a statutory notice for the sale of the suit property.**
- b) **There is no money due and owing under the facility, the subject of charge.**
- c) **The Plaintiff's claim against the 2nd defendant is based on illegality leveled interest and other charges on the loan facility in violation of section 44 of the Banking Act and also in violation of the duplum rule.**

The application is supported by an affidavit sworn by one PHILIP KARANI the 2nd Plaintiff herein.

The application is opposed. Mr. Isaac Njoroge the Legal Manager of the Defendant, Kenya Commercial

Bank has sworn a replying affidavit dated 22nd January, 2009.

This application was argued by Mr. Kinyanjui on behalf of the Applicant and Mr. Ngugi for the 1st Defendant. The Applicant seeks an injunctive order against the 1st Defendant. The disputed facts about this matter is that the Applicant who is the Plaintiff is seeking to restrain the 1st Defendant from selling by public auction or private treaty the suit property registered as Land Title No. Eldoret Municipality/Block 14/638. The Legal Manager of the 1st Defendant in the replying affidavit at paragraph 7 has deposed that the suit property was sold by public auction on 5th December, 2008 for Kshs.1,005,000/-. Annexed to this affidavit are two copies of Certificate of Sale. At paragraph 8, the deponent avers that the purchaser of the suit property did settle the entire purchase price subsequent to that sale. I noted that the Respondent did not file any affidavit in response to the averments that the suit property was sold at a public auction and therefore that issue is not controverted.

In an application of this nature, before the court can grant any injunction, the Applicant must establish that it has a *prima facie* case with a probability of success at the trial or that it will suffer irreparable loss which cannot be compensated by an award of damages or alternatively on a balance of probability the convenience should tilt in favour of the Applicant. See **Giella & Anor vs. Cassman Brown [1973] EA 353.**

I have considered this application. The Applicant's complaint is that the sum demanded from the Plaintiff was far in excess of what the Plaintiff expected, that it was unlawful and exorbitant and there was the need for taking of accounts for a property the Respondent sold earlier which was charged to secure the 1st Plaintiff's loan facility. It is contended that the property sold by the 1st Defendant was a Nairobi property, Nairobi/Block 118/394. It was sold in 2001 and the Applicant contends that accounts had not been taken. The Plaintiffs are seeking to restrain the 1st Defendant from selling the suit property until accounts are taken and accounting done in respect of the first sale.

As already stated, it is very clear that the 1st Defendant has already sold the property in a public action. That sale was conducted on 5th December, 2008. The Applicant has annexed a Statutory Notice dated 17th June, 2008 sent to the Applicants by registered post. The 45 days redemption notice was issued by the Auctioneer and was dated 7th October, 2008. It was attached by the Applicant in their supporting affidavit as annexure 1. There was also a notification of sale to the Applicant issued by the auctioneer giving notice of the sale of the suit property on the 5th December, 2008 at 11.00 a.m. That notice is also annexed to the Applicant's supporting affidavit.

It is very clear from this two documents that the Applicant was aware of the impending sale in good time and yet delayed in bringing this application until the day the sale was to take place, on 5th December, 2008. From the application itself, the Applicant is not contending that they were not issued with the requisite notices before the suit property was sold. They are not challenging that the notices were defective or ineffective for any reason. All the Applicant is claiming is that there was need for the taking of accounts before the suit property could be sold

It is trite that an injunction cannot issue to restrain a chargee from exercising its statutory power of sale merely on grounds that accounts have not been taken. **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** states as follows: -

"725 When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount which the mortgagee claims to be due to him unless, on the terms of the mortgage, the claim is excessive."

In **Francis J. K. Ichatha v. Housing Finance Company of Kenya Limited Civil Application No. 108/05**, the Court of Appeal dealt with an application for injunction pending an intended appeal. The court noted as follows, at page 4 of their ruling:

“Nevertheless, we are satisfied that the intended appeal raises arguable questions of law particularly on the legality of “Penalty Interest/Interest on arrears”, imposed and on the variation of the interest rates.

However, the applicant’s case in the superior court was not that he was not in arrears of the loan or indebted to the respondent at the time the statutory notice was issued. Rather, his case was, if we have correctly understood it, that the levying of penalty interest/interest on arrears and the application of high interest rates of up to 26% p.a. erroneously inflated his indebtedness thereby frustrating his efforts to redeem his property.

The dispute is essentially on the quantum of the arrears and the loan at the time the statutory notice was issued. The applicant recognized that the dispute was of “Mathematical nature.” Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale.”

As is clear from the Court of Appeal case cited above, and in many others, it is trite law where an injunction is sought on account of a dispute of mathematical nature, the courts have held that the existence of such a dispute is not a valid ground for restraining a chargee from exercising its statutory power of sale. As has been shown in the submission by counsel for the Applicants, and also in the supporting affidavit of Philip Karani, this application was made on the basis of a dispute as to the accounts. There is no other complaint raised against the Respondent’s exercise of statutory power of sale.

The Applicant has not shown that it has a *prima facie* case with the probability of success. The ground argued being that of accounts, is not a valid ground upon which the court can exercise its discretion to grant an injunction in this matter.

On the question whether the Applicant stands to suffer irreparable loss which cannot be compensated by an award of damages, for the same reason that I have given above, a dispute as to accounts cannot prevent a chargee from exercising its statutory power of sale. The remedy available to the Applicant in such circumstances is compensation for damages. It therefore follows that any loss that the Applicant stands to suffer or may suffer is compensatable by an award of damages that has been recognized under section 74 of Registered land Act. On that ground also the injunction sought cannot issue.

On the question whether the injunction should lie on a balance of convenience, I find that the balance of convenience tilts in favour of the Respondent. It is not disputed that the Applicants were indebted to the 1st Defendant who is the Respondent in this matter. It has been shown that the suit property has already been sold in a legally conducted public auction and the purchaser has paid the full purchase price. Given that scenario, on a balance of convenience the balance should tilt in favour of the Respondent on grounds the sale was legally conducted and the purchase price fully paid by a party who has not been enjoined to this suit.

Having come to this conclusion I find that the application before the court is without any merit whatsoever and accordingly I dismiss it with costs to the Respondent.

Dated at Nairobi this 22nd day of May, 2009.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

N/A for Mr. Kinyanjui for the Applicant

N/A for Mr. Ngugi for the 1st Defendant

LESIIT, J.

JUDGE