

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 440 OF 2008

SIMON KANYINGI MAINA.....PLAINTIFF

- VERSUS-

BARCLAYS BANK OF KENYA..... DEFENDANT

RULING

The plaintiff filed an application pursuant to the provisions of **Sections 3 and 3A** of the **Civil Procedure Act**, **Section 52** of the **Transfer of Property Act** and **Order XXXIX Rules 1,2 & 3** of the **Civil Procedure Rules** seeking orders of injunction to restrain the defendant by itself or by its agents or servants from interfering with the plaintiff's right of possession, advertising for sale, disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty of the plaintiff's properties known as LR No. 14906/19 Muthaiga North Estate, LR No. 14906/20 Muthaiga North Estate, LR No. 209/12977 Lumumba Estate Nairobi and Kiambu Municipality Block 111/149(*hereinafter referred to as the suit properties*) pending the hearing and determination of the suit. The plaintiff further prayed for an order of the court that during the pendency of the suit no further registration or change of registration in ownership, leasing, sub-leasing, allotment, user, occupation or possession in respect of the suit properties should be allowed and be prohibited. The application is supported by the annexed affidavit of Simon Kanyingi Maina, the plaintiff and on the grounds stated on the face of the application. The application is opposed. Allan Onyango, the legal counsel of the defendant swore a replying affidavit in opposition to the application.

Prior to the oral hearing of the application, the parties agreed by consent to file written submissions highlighting their respective opposing positions. The written submissions were duly filed. The parties further filed authorities in support of their respective cases. At the hearing of the application, I heard rival arguments made by Mr. King'ara for the plaintiff and by Mr. Ochieng for the defendant. I have carefully considered the said arguments presented to me, including the written submissions filed by the parties herein. I have also considered the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420**).”*

In the present case, I will address the main point raised by the plaintiff and the response by the defendant in reaching a determination whether the plaintiff established a prima facie case to entitle this court grant him the interlocutory injunction sought. Certain facts are not in dispute in this case. It is not disputed that the plaintiff is the registered owner of the suit properties. The plaintiff is also a director of a company known as Kabka Vegetable and Flower Exporters Ltd (*hereinafter referred to as the company*). In 1997, the company was offered overdraft/bid bond facilities of upto Kshs 5 million by the defendant.

The company was further advanced a loan facility of Kshs 100,000/=. The plaintiff guaranteed the said loan amounts advanced to the company by offering the suit properties as securities. The suit properties were duly charged to secure the sums advanced. The plaintiff executed guarantees and indemnity in respect of the amount advanced to the company. The facilities were renewed in 1998. According to the letter of offer, interest on the facility were to be charged respectively at between 4-6 % above the base lending rate. It appeared that the company defaulted in repaying the amount that was advanced it together with the accrued interest. The defendant sought to realize the securities charged to it by the guarantors.

The suit properties were advertised for sale by public auction on 28th July 2008 by Mssrs Garam Investments, a firm of auctioneers duly instructed by the defendant. According to the plaintiff, the defendant acted illegally when it purported to exercise its statutory power of sale by advertising the suit properties for sale before serving the plaintiff with the requisite statutory notice. It was the plaintiff's case that the statutory notices were sent through a postal address that did not belong to the plaintiff. It was argued on behalf of the plaintiff that the postal address, i.e. P.O. Box 11480 Nairobi had at the time the said statutory notices were allegedly issued, been repossessed by the Postal Corporation of Kenya and allocated to another person known as Waiyaki Watson Kahara. It is was further the plaintiff's case that even if the plaintiff still rented the postal address, the statutory notice would not have reached him in view of the fact that the defendant had sent the said notices without affixing the postal code i.e. 00400- Tom Mboya Street Nairobi.

The plaintiff urged the court to consider whether the defendant had complied with the provision of **Section 102 (2) (d)** of the **Transfer of Property Act** and **Section 74** and **153** of the **Registered Land Act** as regard the issue whether the defendant had served the statutory notice as required by the law. In response to the plaintiff's submission the defendant annexed copies of statutory notices dated 3rd March 2008 that were issued to the plaintiff by registered post through the said postal address of P.O. Box 11480 Nairobi. According to the defendant, it had sent the said statutory notices to the last known postal address of the plaintiff. It was the defendant further submission that if the plaintiff had indeed surrendered the postal address, it was his duty to inform the defendant of the change of postal address. In any event it was the defendant case that the plaintiff was served with the notification of sale by the auctioneer before the suit properties were advertised for sale.

Having considered the rival argument made by the parties in regard to whether statutory notice was served, I take the following view of the matter. The law required the defendant to issue a statutory notice to the plaintiff, and if sent by registered post, to the last known postal address of the plaintiff. Upon perusal of the two charges that the defendant is seeking to exercise its statutory power of sale, the postal address of the plaintiff is stated as care of P.O. Box 79040 Nairobi. Another postal address provided in another charge is P.O. Box 12704 Nairobi. In the guarantees and indemnity executed by the plaintiff, the plaintiff's postal address is indicated as P.O. Box 79040 Nairobi. There is no evidence on record to suggest that the plaintiff had communicated to the defendant in the postal address indicated in the statutory notices. Other than the letter of offer which contains the said postal address, it was clear that the defendant sent the statutory notices to a postal address that was not indicated in the instruments of charge. For instance, clause 9 (L) of the charge (at page 25) in respect of L.R No.14906/19 provided that where a notice was required to be given or authorized by the law, such a notice, if sent by registered post, shall be sent through the postal address of the chargor. Under **Section 102(d)** of the **Transfer of Property Act**, a letter sent by registered post shall be sent to the mortgagor at his last known postal address. Similarly, under **Section 153(c)** of the **Registered Land Act**, where notice is sent by registered post to a chargor, it is required that such registered post is sent to the last known postal address of the chargor. **Section 69 A** of the **Transfer of Property Act** requires that a mortgagee serves a mortgagor with a statutory notice before he can exercise his statutory power of sale. Under **Section 74 of the Registered Land Act**, it is mandatory for the chargee to issue the chargor with a statutory notice requiring him to remedy any default before such chargee can exercise its statutory power of sale.

In the present application, three of the parcels of land that are the subject matter of the suit are registered under the **Registration of Titles Act**. One property is registered under the **Registered Land Act**. The applicable legal regimes for the two sets of properties are the **Transfer of Property Act** and the **Registered Land Act** respectively. It was therefore clear that the defendant did not comply with the

legal imperative that required it to issue the requisite statutory notices before it can purport to exercise its statutory power of sale. I think the law is now settled that where it is established that the requisite statutory notice was not issued, the court is entitled to hold that the right of the chargee or mortgagee to sell the suit properties by exercising its statutory power of sale cannot in the circumstances have arisen. I need not look further than two decisions i.e. **Simiyu vs Housing Finance Company of Kenya [2001] 2EA 540**, and, **Trackspa Limited vs Industrial and Commercial Development Corporation Nairobi HCC No.21 of 2001 (Milimani) (unreported)** where it was held that where a chargee or mortgagee fails to issue the requisite statutory notice, it cannot in law proceed to exercise its statutory power of sale with the sale of the charged properties.

Has the plaintiff established a prima facie case to entitle this court grant him interlocutory injunction sought? In the present case, it was clear that the plaintiff was in default in repaying the sum that he had guaranteed the company. The defendant was therefore entitled to pursue the course of action that it did i.e. by seeking to realize the securities that were charged to it. However, instead of serving the statutory notices upon the defendant in the postal addresses provided in the instruments of charge, the defendant sent the notices to an address that is unknown or is not provided for in the said legal instruments. I therefore hold the plaintiff has established a case to entitle this court declare unlawful the statutory notices issued by the defendant. The intended sale of the suit property by the defendant in exercise of its statutory power of sale on the basis of the impeached statutory notices cannot therefore legally proceed. The said sale and the entire process leading to the advertisement of the suit properties for sale is set aside. To that extent, the plaintiff's application succeeds.

However, as stated earlier in this ruling, this court upon evaluation of the facts of this case finds that the defendant was entitled to realize the securities charged as the plaintiff has been in persistent default. This court therefore grants the injunction sought by the plaintiff in so far as it restrains the defendant from proceeding with the sale of the suit properties under the process that is now impeached and set aside. The defendant shall however, be at liberty to exercise its statutory power of sale if it issues and serves with proper statutory notices to the plaintiff in the postal address or in any manner contemplated in the instruments of charge.

In view of this court's ruling, costs of the application shall be in the cause.

DATED IN NAIROBI THIS 17TH DAY OF JUNE 2009

L. KIMARU

JUDGE