**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**ENVIRONMENTAL & LAND CASE 286 OF 2009**

**GEORGE KAMAU GAITI & ANOTHER……....……..PLAINTIFF**

**VERSUS**

**KENYA TOURIST DEVELOPMENT CORPORATION…….….DEFENDANT**

**RULING**

The plaintiff moved to this court, by way of a plaint, dated 15th day of June 2009, and filed on the 16th day of June 2009. Scheming through it reveals that:

- The plaintiff is the registered owner of the suit land.

- The property was used as a loan security to source funds from the defendants whose amount is not given.

- The said loan was not for free but it was required to be repaid back.

- The plaintiff contends to have repaid a total of Kshs 624,187.00

- The defendant issued a demand for Kshs 2,875,813.00 which the plaintiff alleges to be usurious, unconscionable and uncontractual.

- By reason of the alleged default,

- The defendant has scheduled to sell the said property which sale is alleged to be illegal, null and void. By reason of the afore said, the plaintiffs seek:

*(a) permanent injunction to restrain the defendant either by itself, servant and or agent from selling, alienating, disposing and or in any way interfering with the plaintiffs ownership of the suit land.*

*(b) A declaration that no statutory power of sale is exercisable in view of lack of statutory notice.*

*(c) Costs of the suit and interest therein.*

*(b) Any other relief this honorable court may deem fit and just to grant.*

On the plaint, is anchored an application by way of chamber summons dated the same date and filed

the same date as the plaint. It is brought under section 3A of the CPA order XXXIX rule 1, 2 and 3 of the CPR and all other enabling provisions of the law. 4 prayers are sought namely.

(1) Spent

(2) 2 and 3 seek a temporary injunction to issue restraining the defendants either by themselves, servants and/or agents, from advertising for sale, offering for sale, selling, alienating and or in any way entering into an agreement or conveyance for sale, by public auction and/or private treating all that piece or parcel of land known as LR NO 2250/121 or any part there of, pending the hearing and determination of this application as per prayer 2, and pending the hearing and determination of the suit as per prayer 3.

(3) That costs of this application be provided for.

The grounds in support are in the body of the application, supporting affidavit and oral representations in court. The major ones are:-

- The plaintiffs are the registered owners of the suit property.

- They own a company by the name of Cross Culture Crafts Ltd.

- This company borrowed money from the defendant.

- The plaintiffs granted the loans using title to the suit property.

- The company beneficiary was the one charged with the repayment of the said loan.

- The deponent George Gaiti depones that he had been checking with the defendant about the loan repayment and he had all along been assured that the same was being repaid and infact an amount of Kshs 624, 187.00 stands repaid.

- The property is used as a family residence.

- They have come to court, because the plaintiffs as guarantors were not served with the statutory notice warning them to redeem the same. But served the borrower.

- It is their stand that the said right of recovery has not accrued because they have not served a notice to the guarantors and as such an injunctive relief should issue.

- They rely on section 69 and 74 of the RLA and case law cited.

In opposition, the defendant has put in a replying affidavit deponed by one Carrey Francis on 24th day of June 2006, and filed the same date, and oral highlights in court, and the major ones are as follows.

- It is correct that the plaintiffs charged the suit land to the defendant with the plaintiffs as guarantors.

- The loan was advanced to Cross Culture Crafts Ltd a company under the directorship of the plaintiffs.

- The company was advanced Kshs 3,500,000.00.

- The said company defaulted in loan repayment necessitating the issuance of the statutory notice annexture CF1.

- They contend their right to exercise their right of the statutory power of sale was allowed.

- They contend notice was received because the applicants commenced proceedings namely HCCC NO ELC 149/2009 in the names of the borrower which was later on withdrawn.

- They have moved to this court, seeking the same reliefs and now in the names of the guarantors and are thus abusing the due process of the court.

- Contend that the statutory notice was duly served as the same was sent to the last known address of the plaintiff, which is the same address used by the guarantors and the borrower.

- It is their stand that the said notices were in fact received because the content was never returned to them and if the same has not been collected then that default lies with the plaintiffs and not the defendants.

- Non receipt of the letter does not arise because after the same was issued, the plaintiffs came and held a meeting with the defendants in the defendants board room, during which time they acknowledged receipt of the letter.

- There is no denial that the address belongs to them.

- Contend that the applicants cannot seek an injunction to restrain the defendants from exercising their statutory right of sale solely because there is a dispute over accounts.

- The fact that the property is matrimonial property is not justification for the granting of an injunction because the moment the property was charged to the defendants it became property for sale upon default of the loan repayment.

- Further that the applicants are disentitled to the injunctive relief because they are guilty of non disclosure of material particulars pertaining to the dispute.

- They are also unwilling to liquidate the debt as such the application should be dismissed.

In response the applicants stated that the statutory notice was addressed to the principal borrower and not the chargers and as such they have made out a case for an award of an equitable relief.

On case law, the court, was referred to the case of TRANS WESTERN HARVESTERS LTD AND NAIROBI GRAPES PLANTATION LTD VERSUS BARCLAYS BANK OF (K) LTD KISUMU CA NAI 106 OF 2009 (UR67/2009) decided by the CA on the 17th day of July 2009. The background information is that the applicants had sought an injunctive relief from the superior court, on the ground that the loan borrowed by the first applicant had not been granted or secured by the suit property belonging to the second applicant. The injunction was to restrain the respondents from selling off the suit property as security for the loans. Among others it was argued that the loan facility had been over paid.

At page 7 of the ruling, the CA made observations that the superior court, had dismissed the injunctive application for the following reasons among others:

*(i) That it has now been settled law by the decision of the CA in HABIB BANK A.G. ZURICH VERSUS POP –IN (K) LTD AND OTHERS CA 1989 (4)/1989 (UR) that a dispute as to the exact amount repayable is not a ground upon which a borrower who was served with a valid statutory notice can obtain an injunction to restrain a bank from exercising its statutory power of sale.*

*(ii) The learned judge was not persuaded that the plaintiffs had a prima facie case which is the first principle in granting an interlocutory injunction as per the celebrated case of GIELLA VERSUS CASSMAN BROWN CO. LTD (1973) EA 358.*

*(b) They had not shown that they would suffer irreparable loss if any of the charged property is sold.*

*(c) That once a property had been charged to secure a loan it became a chattel on sale if there is any default on the part of borrower, if for any reason.*

*It eventually turns out that the second plaintiff charged property was wrongfully sold. The defendant will be able to compensate the second plaintiff.*

*(iii) There was no merit in the application and the same was dismissed.*

At page 9 of the ruling, it is observed that one of the arguments advanced to the CA was that the respondent was not entitled to exercise its statutory power of sale and that it was in breach of the relevant law at the time. Where as the respondent argued that the respondent was entitled topower of sales.

At page 10, when rejecting the application, the CA ruled : "*once a property is charged, it becomes a marketable security and should the applicants succeeds an appeal they will not be without a remedy"*.

The case of FELIX KIPRONO KEMBOI VERSUS BARCLAYS BANK (K) LTD AND GORAM INVESTMENTS ELDORET HCC NO 75 OF 2008 Decided by M.K Ibrahim on the 6th day of August 2008. The back ground information to that ruling is that the plaintiff had sought an injunctive relief anchored on a declaration that the first defendant's statutory power of sale had not crystallized, and the intended action is a nullity in law, with the main contention being that the bank had never issued any statutory notice on the plaintiff as chargee as required by the provision of section 73 of the Registered land Act, Chapter 300 Laws of Kenya. In disposing off the application the learned judge made the following observations running from page 2 line 8 from the bottom to page 3:-

" *I have carefully perused the alleged statutory notice. It is dated 29th October 2007. It demands payment of Kshs 23,159,560/80 and is for 3 months notice. It is addressed to the plaintiff and through P.O Box 16.*

- *30300 Kapsabet.*

*The letter is purportedly sent by registered post. The 1st defendant exhibited the certificate of positing dated 30th October 2006.*

*The plaintiff does not deny that the postal address belongs to him and that it was not his last known address. To the contrary this was the same address that he gives in his supporting affidavit sworn on 5th June 2008.*

*I do find that the said statutory notice was a valid notice and which was given under the provisions of the law. It is addressed to the plaintiff and was sent to him. I hold he was duly served by registered post through his own postal address. The plaintiffs based on the question of service of the statutory notice. He has not denied being indebted to the bank and refers to the negotiations for consesions ."*

On the basis of the foregoing, the learned judge opined that the applicant had not established a prima facie case with a probability of success and dismissed the application and discharged the interim order.

Due consideration has been made by this court, as regards the a fore set out rival arguments and the court, makes a finding that the contest deals with the issue of whether an injunctive relief is to be granted or not. As demonstrated by the case law cited, the yard stick is well known, namely the principles established by the case of GIELLA VERSUS CASSMAN BROWN LTD 1973 EA 358. These are:-

The applicant has to establish the following:-

*(i) That he has a prima facie case with a probability of success.*

*(ii) That if an injunctive relief is not granted, the applicant will suffer irreparable loss.*

*(iii) That if (i) and (ii) are not in his favour then the balance of convenience falls in his favour.*

The above principles have to be applied to the centrol argument of each side. Those of the applicant are as follows:-

(a) Indeed a loan was taken by a company called Cross Culture Crafts Ltd.

(b) This loan was advanced by the defendant.

(c) There is an agreement in place which has been exhibited

(d) The amount of the loan advanced has not been mentioned in the plaint, and supporting affidavit but there is an agreement exhibited showing that the amount taken was Kshs 3,500,000.00. The loan was repayable in three years time as stipulated in the agreement. It is dated 30th July 2004 and executed on 20th 08/04. This courts' construction of the above dates is to the effect that three years from 20/08/2004 would lapse on or about 21/08/2007.

(e) The applicant admits to have made payment of Kshs 624,187.00 towards the loan repayment, presumably as at the time they came to court, meaning that the loan period had lapsed but the loan had not been fully paid.

(f) The applicant does not seem to dispute the fact that the defendant/respondent was entitled to move in and realize the security but contends that a wrong party was served with the statutory notice namely the principal borrower and not the guarantors as well and as such, the notice is invalid because the property belongs to the guarantors and not the borrower.

The stand of the defendant respondent on the other hand is that:

- Indeed the loan was advanced.

- There is default and they were entitled to move in and realize the security.

- The statutory notice they issued is valid because they sent it by registered mail using the address given in the loan agreement

Due consideration has been made of this fact by the court, and the court, proceeds to make findings that indeed the loan was advanced to a company called Cross Culture Crafts Ltd. Apparently, part payment has been made. The loan repayment period lapsed before the loan was fully repaid.

There seems to be no serious dispute hat the lender was entitled to move in and realize the security on the basis of the default. The applicants serious contest is on the issuance of the notice. It is not disputed that one was issued. The plaintiff contests receipt of the same. The defendant says that they complied with the law by sending the notice to the address given. Further that they have not denied that the address used belongs to them.

A perusal of the record reveals that this notice has been annexed as CF1 to the replying affidavit which indicates clearly that it is a statutory notice under section 69 A of the RLA. It is dated 9th December 2008 and addressed to the Director Cross Culture Crafts Ltd Mercantile file house 2nd Floor Room 226. P.O Box 56003, Nairobi.

It was sent under registered cover, using the address on the letter. There is another communication marked GG111 to the supporting affidavit, also addressed to the same address. A reading of the content reveals that it referred to a meeting between the Directors of the borrower and the defendant over loans issue. It is mentioned that the Directors of the borrower had complained that they had not received statutory notice addressed to them on the 9th December 2008. The letter is dated 30th January 2009. The content informed the addressee that the notice had been sent under registered cover, whose details are contained in the registration slip annexed along side CF1.

It is to be noted that, there is no correspondence from the applicant to the defendants, that they had checked their rental postal box at the relevant place, and missed the contents. Neither is there any complaint to the relevant post office authority that they were addressed a letter which never reached them. Nor did they procure any communication from the post office to the effect that from the records held by them, no such Registered mail was ever processed by them. In the absence of that, there is nothing to oust the defendants assertion that the letter was addressed to the correct address under registered mail, and if the same has not reached them then it is because they have not bothered to go and collect the same. Further the applicant has not ousted the defendants assertion that the letter was addressed to the correct address. There was issue raised about necessity of the notice to be served on the borrower, as well as the guarantors. That if the notice was addressed to the borrower the same is in effective in so far as the guarantors are concerned. It is common ground that the borrower is a company or a non-natural person and definitely its transactions are handled by those mandated to handle them, namely, the Directors, evidenced by the appending of the signature on the loan agreement. It therefore follows that in the absence of proof that the functions of the company are handled by persons other than the Directors, in the first instance, and in the second instance, in the absence of a communication from the applicant to the defendants that the position of the borrower and guarantor is distinct, and hence deserve to be addressed separately, the defendants move of addressing both the borrower and the Director in one package cannot be faulted. For the reasons given in the assessment, the court, is satisfied that a statutory notice was issued, addressed to the correct address, which address, has not been disowned by the applicant, and which address, was the same address used on the loan document which address, operates for both the borrower company as well as the directors, as there has been no demonstration that the functions of the directors was distinct from that of those who handle the affairs of the company. This finding as mentioned, has been fortified by the fact that despite the complaint raised by the applicants of non receipt of the statutory notice, no efforts were made by them to confirm the sending or non sending of the said documentation through the given postal address. As such the court has no alternative but to draw inspiration from the decision of Ibrahim J in the case of FELIX KIPRONO KEMBOI (SUPRA) that, since the address given on the loan agreement, was the one used to send the statutory notice, which notice was under registered cover, and which notice has not been returned to the sender, the possibility of its receipt by the applicants cannot be ruled out. The notice was therefore received.

The question for determination is whether on the facts assessed above, the applicant has earned an injunctive relief or not. The answer is that, an injunctive relief has not been earned by the applicants because of the following reasons:

(1) A prima facie case with a probability of success has not been established because:-

(a) There is no dispute that the loan was advanced to the applicant, which loan had a time frame within which to be repaid namely three years.

(b) The three years lapsed almost 2 years back.

(c) The applicant concedes only to have paid a small fraction of the said loan.

(d) There is no proposal or demonstration of willingness to complete the loan repayment even after coming to court for an intervention.

(2) The only reason advanced by the applicants for seeking the courts intervention is because of an alleged non ser vice of the statutory notice on to the Directors, but concede that the company was served. The court, makes a finding that the Directors were also served with the statutory notice because:-

(a) There is no demonstration that the affairs of the company are handled by persons distinct from the Directors.

(b) The address used to send the notice is the same one used on the loan agreement.

(c) There is no demonstration by the applicant that after being informed that the notice had been sent by

registered mail, they made efforts to seek confirmation from the postal authority that the said letter never passed through them.

(d) The content of the registered mail was never returned to the defendant.

(3) issue of suffering irreparable loss by reason of the property being family residence, does not hold because as ruled by case law emanating from the CA, the moment the same was used as security it became a commodity for sale and the only proper way of saving it from being sold is repayment of the loan.

(b) Its value can be computed and paid for in damages.

(c ) There is no demonstration that the defendant is not entitled to take refuge under the 2nd ingredient that damages will be anadequate compensation as it has not been demonstrated that the defendant has acted in a high handed, and oppressive manner and in disregard of the law.

(d) the defendant has demonstrated that they acted within the law as default appears to have occurred even during the contracted loan repayment period but only moved to exercise their statutory power of sale over a year after the contracted repayment period lapsed.

(4) The balance of convenience does not tilt in favour of the applicant because:-

(a) They undertook to repay the loan.

(b) They have defaulted on that repayment.

( c) After being served with the statutory notice only, made moves to thwart the intended sale, but have not demonstrated willingness or efforts to repay the same show of by the fact that they took a loan of 3,500,000.00 at an interest rate, of 14% in 2004, and as at 2008, when they came to court, only 624,187.00 had been paid.

(d) No suggestion of modalities to repay if given a chance by this court were put forward.

(5) Even if it can be taken that the amount said to be outstanding is usurious, and or unconscionable, this will be a dispute over accounts which case law has ruled that it cannot be used as a g round for earning an injunctive relief.

(6) For the reasons given in number 1-5 above, the applicants application dated 15th day of June 2009 and filed on 16th day of June 2009 be and is hereby dismissed with costs to the Respondent.

**Dated, Read and delivered at Nairobi this 18th day of September 2009.**

**R.N.NAMBUYE**

**JUDGE**