



SALIM MACKINA HUSSEIN ..... PLAINTIFF/APPLICANT

VERSUS

ECOBANK KENYA LIMITED ..... DEFENDANT/RESPONDENT

## **RULING**

By a suit filed by the plaintiff on 31<sup>st</sup> July 2009 the plaintiff sought for orders that the interest rates charged by the defendant are oppressive and contrary to Banking Act. He also sought for an order restraining the defendants from selling, advertising for sale, transferring or interfering with the property known as Nairobi Block 97/1595 until the determination of the suit. Simultaneously with the filing of the suit the plaintiff filed a chamber summons seeking for interim orders pending the determination of the suit.

This application is predicated on the grounds that the defendant advertised for the sale of the suit premises on 14<sup>th</sup> August 2009, by way of Public Auction. The plaintiff contends that he was not issued with the three months statutory notice as required by the Registered Land Act. The application was further supported by the affidavit of the plaintiff sworn on 4<sup>th</sup> August 2009. According to the plaintiff, if the defendant is not enjoined, The plaintiff will suffer prejudice because he was not issued with the notice as provided for under Cap.300. The defendant is relying on an earlier notice which was made on 19<sup>th</sup> October 2006 which notice was overtaken by events after the parties entered into a consent. It is the contention of the plaintiff that he is entitled to a fresh notice before the defendant can purport to sell the property by public auction . He urged the court to grant the injunction and stop the intended sale.

This application was opposed by the respondent. Reliance was placed on the replying affidavit sworn by **Wilfred Oroko** sworn on 18<sup>th</sup> September 2009. It is the defendant's case that the plaintiff had filed a previous suit after the plaintiff defaulted in loan repayment. A statutory notice was issued and notification of sale was issued in accordance with Auctioneers Rules, that is when the plaintiff filed **CMCC NO. 1565 OF 2005** between the same parties. The plaintiff was granted an interim order of status quo and the matter was fixed for hearing on 14<sup>th</sup> April 2005 when the plaintiff did not appear and the application was dismissed with costs. After the injunction application was dismissed the plaintiff was issued with a statutory notice dated 19<sup>th</sup> October 2006 as well as the notification of sale when the plaintiff requested to be accommodated to pay the outstanding loan and the following consent order was recorded on 11<sup>th</sup> June 2007:

***“It is ordered***

***1. This suit be withdrawn against East African Building Society now known as EABS Bank Ltd and the plaintiff do pay Ksh.82,126/- in respect of the costs of this suit together with Advocates/Client legal fees to be paid from the date of filing this consent letter.***

***2. The plaintiff shall pay Ksh.80,000/- as monthly installments beginning from 12<sup>th</sup> June 2007 and on the 7<sup>th</sup> of every succeeding month until payment in full in order that Ksh.47,092/80 goes towards the normal monthly installment for loan repayment and the balance thereof be utilized to reduce the loan arrears. Failure to pay the costs or the monthly installments on due date entitles the Defendant to be at liberty to realize its security immediately.***

***3. The Plaintiff shall pay the valuers and auctioneers charges from the date of filing this consent***

**letter and upon being supplied with charges.”**

The plaintiff breached the consent order by failing to comply with the terms therein and as at 30<sup>th</sup> April 2009, the outstanding loan stand at Ksh.2,240,300.84/- together with interest as per the statement annexed to the application. For reasons that the plaintiff had breached the consent order, in exercise of the defendant’s power of sale, the auctioneers were instructed to issue a notification of sale of the suit premises on 14<sup>th</sup> August 2009. The defendant had no obligation under the law to issue a fresh statutory notice because they had already issued one dated 19<sup>th</sup> October 2006 which was simply suspended by the consent order to accommodate the plaintiff. Counsel submitted that the plaintiff had not fulfilled the principles for granting an interlocutory injunction. She urged the court to draw guidance from the decision in the case of **Augustine Kirui Kibet v Savings & Loan (K) Limited [2006] ekLR.**

On the point of the matter being *res judicata* counsel urged the court to be directed in the case of **Deasons (K) Limited v Fidelity Bank Limited HCCC NO. 572 OF 2006**

Having set out the summary of the rival submissions by both counsel of the plaintiff and the defendant the issue for determination is whether the plaintiff has established a prima facie case with a probability of success and whether the plaintiffs claims is *res judicata* following the settlement of recorded in **CMCC 1565 OF 2005**. It is not in dispute that the plaintiff borrowed a loan from the defendant for Ksh.1.5 million on 15<sup>th</sup> July 1996. The loan was secured by a charge over the suit premises. The plaintiff defaulted in the repayment of the loan. The defendant attempted to realize the security but the plaintiff filed **Milimani CMCC NO. 1565 OF 2005**. That suit was compromised as per the above consent order. The plaintiff failed to oblige and comply with the consent order and the defendant issued a notification of sale which prompted this application.

It is on record that a statutory notice was duly served upon the plaintiff on 19<sup>th</sup> October 2006, there is no requirement in law that a statutory notice can be overtaken by a consent order. The consent order required the plaintiff to pay the loan in installments which he further defaulted and was issued with a notification of sale. The plaintiff has not claimed that he was not served with the notification of sale by Watts and Enterprises Limited dated 23<sup>rd</sup> July 2009 which was personally served upon him detailing the sale of the property on 14<sup>th</sup> July 2009. The plaintiff has been given an opportunity to redeem his property vide the statutory notice of 19.10.2006 and the notification of sale pursuant with the Auctioneers Rules. Accordingly the plaintiff has not fulfilled the principles for granting an order for injunction as set out in of cited case of **Giella vs Cassman Brown Company Limited EA 1973**. Applying those principles to the present case as stated above, the plaintiff borrowed the loan he defaulted in repayment he made proposals on how to settle but defaulted. Further the plaintiff has been aware of the outstanding loan when he entered into a consent.

In view of the aforesaid matters the defendant cannot be restrained from exercising its statutory power of sale in the circumstances of this case. Moreover the plaintiff had filed a similar suit seeking for similar orders which suit was settled by consent. The plaintiff cannot file a suit on the same issues which were determined and settled by consent. The rule of *res judicata* is well explained under section 7 of the Civil Procedure Act whose objectives is to bring litigation to an end and to stop an individual from being subjected to the same litigation twice. I find this present application an abuse of the court process as the same matters were settled in **CMCC NO. 1565 of 2005**. This application lacks merits and is hereby dismissed with costs to the defendant.

RULING READ AND SIGNED ON 30<sup>TH</sup> OCTOBER 2009 AT NAIROBI

**M.K. KOOME**

**JUDGE**