



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 596 of 2008**

**MARGARET NANDAKO WAFULA .....PLAINTIFF**

**VERSUS**

**JAMES SIMIYU WANYONYI**

**GEORGE MWANGI MUGURO**

**J.K. KANIA**

**HOUSING FINANCE CO. (K) LIMITED**

**NGURU ENTERPRISES.....DEFENDANTS**

**R U L I N G**

Application dated 27/6/2006 brought under Order XXXIX Rule 1 and 2, Civil Procedure Act, Section 3A and 63 (e). The applicant seeks orders that pending hearing of this suit the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants be restrained by an injunction from selling or offering for sale by private treaty or public auction property L.R. Nairobi/Block 82/2404 Greenfields Estate, Nairobi.

The grounds upon which the application is brought are stated and is supported by affidavit of Margaret Nandako Wafula, the plaintiff, sworn on 27/6/2006. She is joint proprietor with her husband of the above-mentioned suit property. She was residing on the property but she took a job in Webuye where she was residing at the time these events took place.

She admits that a document which was a sale agreement in respect of the suit property was brought to her for her to sign. The second defendant was the purchaser. She declined to sign. On inquiry she found her husband had signed the agreement. She said she had not been served with Statutory Notice or Auctioneers' Notification of Sale. Furthermore, she says she has placed a bankers order in favour of the 4<sup>th</sup> defendant in the sum of Kshs.18,000/= per month. This is confirmed in the mortgage statement and no time did the 4<sup>th</sup> defendant notify her to cease paying.

In her amended plaint the applicant prays for the said sale to be nullified and for injunction. In the replying affidavit the 4<sup>th</sup> defendant and 3<sup>rd</sup> defendant, caused the same to be sworn by 3<sup>rd</sup> defendant for himself and on behalf of the 4<sup>th</sup> defendant. He swears that there was unpaid balance and that Statutory Notice was sent to the plaintiff at address in Nairobi demanding Kshs.2,219,568/=.

It is to be noted that the advance was Kshs.750,000/=. There is also exhibited, a letter by the plaintiff's husband written from Nairobi which talks about "We acknowledge"\_then he talks:-

*“My loan” and “I now promise ..... to reducing this loan”.*

And although he mentions that his wife pays Kshs.18,000/= per month, he does not say he has discussed the Notice with her. Exhibit “JK 6” a letter by the husband does not indicate that the plaintiff is in the picture and she does not give her consent to the sale by private treaty.

By letter dated 31/5/2006 the 4<sup>th</sup> defendant acknowledged that one of joint owners has declined to consent to the sale by private treaty and by 22/6/2006, this suit was filed. It is now to be noted that the 4<sup>th</sup> defendant was aware that the plaintiff had rights of a mortgagee in this property. However, the Statutory Notice was never served upon. She was residing in Webuye not in Nairobi. It is only the 1<sup>st</sup> defendant, who acknowledged service.

The letter dated 28/2/2006 did not confirm that the plaintiff was properly served. It only said that she had committed her salary to pay Kshs.18,000/= per month which she did as shown in the statement. The 4<sup>th</sup> defendant belongs to a school of thought which believes that husband and wife are one but that one is the husband. That is a discriminatory view of the world.

The plaintiff ought to have been served with notice on her own right. “JK6” was written by husband only who gave consent of sale of “My house” by private treaty.

On auctioneer’s exhibit “RMN1” shows that the chargor declined to sign. And there was no witness. The person served was Edgar Wanyonyi. Another time he served by registered post at an address in Nairobi. He never sent notice separately to Margaret Nandako Wafula. Both parties have filed written submissions.

The plaintiff submits that the applicant was never served with auctioneer’s 45 days. 1<sup>st</sup> defendant was persuaded by employee of the 4<sup>th</sup> defendant to sign sale agreement of the suit property by private treaty. Furthermore, Statutory Notice was not served upon the plaintiff separately. The 4<sup>th</sup> defendant did not comply with Sections 107, 108 and 109 of the Evidence Act and therefore there was no service.

In the case of Mrao Ltd. vs. First American Bank Ltd. & 2 others – Mombasa Civil Appeal No.39 of 2002 at page 13, the court explained what is meant by “*prima facie*” case and said:-

*“So what is prima facie? I would say that in civil cases it is a case in 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 alleged Statutory Notice is not valid. It was stated:-

*“Unless you arrange to settle the same WITHIN THREE MONTHS from the date of service of this notice, we shall exercise our statutory rights under Section 74 of Registered Land Act.”*

This notice does not allow for the period given by the statute as mentioned above. In the case of Trust Bank Ltd. vs. Enos Chemists Ltd. & another – Nairobi Civil Appeal No.133 of 1999 the full bench of judges of Court of Appeal stated the law as follows:-

*“The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue, the statute provided for a three month’s lapse after service of notice.*

*In our judgment a notice seeking to sell the charged property must expressly state that the sale shall take place after the 3 month’s period. To omit to say so or to state a period less than three months for sale is to deny the mortgagor a right conferred upon him by statute.”*

The plaintiff also relies on Section 65 (2) under which the law requires a demand to be made before the Statutory Notice is served and refers to the case of Kanorero River Farm Ltd. & 4 others vs. National

Bank of Kenya Ltd.

Finally, the plaintiff relies on the case of Giella vs. Cassman Brown and submits that she has demonstrated a *prima facie* case.

The defendants, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> also did file written submissions in opposition. There is no dispute that the amount advanced was Kshs.750,000/= and the security was their property Nairobi/Block 82/2404. The 4<sup>th</sup> defendant states that there was default and as at 31/12/2005 the arrears was in the sum of Kshs.2,217,499/90. Therefore, the 4<sup>th</sup> defendant issued only one Statutory Notice although the security was owned by two persons.

The Statutory Notice was defective. It did not give notice of three months' notice. It was not served upon the plaintiff. The evidence shows that the 4<sup>th</sup> defendant was aware that the plaintiff was residing in Webuye away from Nairobi and when they wanted to get her signature to the sale agreement, they sent a messenger with the document to her in Webuye. The evidence and facts show that the plaintiff was never served either with valid Statutory Notice or auctioneer's 45 days' notice.

Failure to serve Statutory Notice invalidates the purported exercise of chargee's power of sale. It is to be noted that the law of mortgagee and mortgagor is not the same as in England. English law is common law while here we operate statutory law. The rights granted by statute may not be denied. The right of chargee to exercise its chargee given rights of sale has to be exercised in accordance with statute.

Where valid notice has not been served the right of chargee to sell does not arise. And the applicant would suffer irreparable loss is the property was to be sold. It has to be remembered that the plaintiff was paying the agreed concessionary amount of Kshs.18,000/= regularly.

Considering this is an interlocutory application, I am satisfied that the applicant has demonstrated a *prima facie* case and cannot be compensated in damages. The balance of convenience tilts in her favour as she is in possession of her property.

In the circumstances, I allow the application and grant orders sought. The costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 19<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**