



REPUBLIC OF KENYA

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

Civil Case 634 of 2002

DIAMOND TRUST BANK (K) LTD.....PLAINTIFF

VERSUS

FRANCIS ICHATHA KAMAU.....RESPONDENT

RULING

The application is a Chamber Summons dated 28th September, 2007 expressed to be brought under **Order XXXIX Rule 1, 2 and 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. Prayer 1 and 2 of the Application is moot. In prayer 3 the Defendant/Applicant seeks orders as follows: -

“3. THAT, a temporary injunction do issue restraining the Plaintiff whether by itself, its agents, servants and/or employees from selling or offering for sale whether by Public Auction or Private Treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property registered as LIMURU/BIBIRIONI/T.52 pending the hearing and determination of this suit.”

The key ground cited in support of the application is that the Respondent had notified the Applicant of the intention to sell the suit property yet no Statutory Notice was served on the Defendant as ordered in the Courts ruling of 20th July 2007.

The application is opposed. The Defendant filed a replying affidavit sworn by its Manager, Debt Recovery Unit, **Elizabeth Hinga**. The deponent has attempted to interpret the meaning of the Court’s ruling by deposing that what the court required was not a re-issue of the three months Statutory Notice under **Section 69A** of **Transfer of Property Act**, but the 45 days Redemption Notice.

The ruling was made by myself after hearing an application for injunction by the Defendant herein which I dismissed. The disputed holding is No. 2 of the Courts ruling in which I held as follows:

“There is no bar to the Defendant to exercise its statutory power of sale over the charged property so long as it issues a valid statutory notice.”

In that ruling at page 4 of copy annexed to the supporting affidavit, I did find that the Defendant did not prove that a Statutory Notice, dated 23rd November, 1995 was served on the Defendant. I also found that no other Statutory Notice was served as required under **Section 69A** of the **Transfer of Property Act**, before the sale intended for 14th March 2007. I also made a specific finding that the Statutory Notice dated 12 years before could not have served any purpose in relation to the sale intended for March 2007. I therefore ruled, not only that no Statutory Notice was served on the Defendant, but that a valid Statutory

Notice should be served on him as required under **Section 69A** of the **Transfer of Property Act** before the Defendant could exercise its Statutory Power of Sale.

That notice cannot be confused with a 45 days Redemption Notice. The two notices are different and serve different purposes in law. The chargees Statutory Power of Sale cannot accrue or arise until the statutory three months notice is served on the chargor or mortgagor.

The ruling is clear. The Defendant should serve the Statutory Notice as prescribed under **Section 69A** of the **Transfer of Property Act**. After that is done, the 45 days Redemption Notice must also be served.

Having made the above order, I conclude by stating that as I ruled on 20th July, 2007 the Plaintiff does not deserve any injunction as prayed for in prayer 3 of the application. The simple reason is that the proceedings in **HCCC No. 128 of 2007** were stayed and the application for injunction dismissed by this Court's ruling of 20th July, 2007. To grant the injunction will defeat the court ruling and order of 20th July, 2007 and will also be erroneous as it will grant the Plaintiff a permanent injunction.

Having come to the conclusion I have of this matter, I direct that the Respondent's Statutory Power of Sale will arise only after it complies with this Court's order by issuing a fresh three months Statutory Notice.

Those then are my orders.

Dated at Nairobi this 22nd day of February, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Issa, Advocate for the Defendant/Applicant

Mr. Mwangi holding brief Mr. Rimui, Advocate for Plaintiff/Respondent

LESIIT, J.

JUDGE