REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 108 of 2007

GEORGE GIKUNDA MUNGANIA ……..…… PLAINTIFF

VERSUS

STANDARD CHARTERED BANK ……..…… DEFENDANT

RULING

Sometimes in 2005 the applicant obtained credit facilities in the form of a loan and overdraft amounting to Kshs. 8.3m secured by parcel of land No. Ntima/Igoki/6189 (the suit property) from the respondent. The applicant has instituted this suit for an order of permanent injunction against the respondent.

Simultaneously with the plaint he filed an application seeking temporary order of injunction against the respondent restraining him for alienating, selling, disposing of or interfering with the suit property. The application is premised on the grounds that the respondent has failed to render statement of account despite demand to do so by the applicant. It is averred also that there was no notice of sale or statutory notice and further that the property was under valued.

These averments have been denied by the respondent who maintains that both the statutory notice and notification of sale were duly served on the applicant; that the reserve price was based on the valuation; that the applicant has been in receipt of statements of account.

Finally, the respondent has deposed that the suit property has been advertised for sale four times. Those are the rival arguments in this application. It is common ground that the applicant obtained a banking/loan facility in terms of an agreement dated 17th June 2005, which facility was secured by a charge over the suit property. The respondent is in the process of exercising its statutory power of sale alleging that the applicant has defaulted in servicing the facility.

The applicant's complaints are that the respondent has failed to render account and in the result it has been difficult for the applicant to regularize his accounts or even ascertain their status. He also claims that he has not received the requisite notices under the law and finally that the reserve price is undervalued. Since the application is seeking the equitable remedy of injunction, it must be considered and decided within the strictures enunciated in the famous case of **Giella V. Cassman Brown and Co. Ltd** (1973) EA 358. Those conditions, simply stated are, existence of a *prima facie* case with a probability of success, likelihood of irreparable loss that would not be adequately compensated in damages and balance of convenience. In considering the first condition the court must avoid making definite findings of either fact or law as to do so would amount to deciding with finality a suit at an interlocutory stage. It is, at this stage, only concerned with *prima facie* case as defined in the **Mrao Ltd. V. First American Bank of Kenya Ltd** (2003) KLR 125.

Starting with the first issue, and without going into the merit of it, the annextures to the replying affidavit marked "GM 10" – comprising a bundle of statement of account for the period December 2004 to September 2007. I am satisfied that the statements were available to the applicant on his own computer. On statutory notice, it has been held that the notice must not only be valid but also sufficient. See **Trust Bank Ltd V. Evos Chemist Ltd & Another**, CA No. 133 of 1999 (unreported). Section 74 of the Registered Land Act, Cap 300 requires three (3) months notice. According to the respondent a statutory

notice was issued to the respondent by their advocate, vide their letter dated 10th April, 2006. The letter was personally served upon the applicant by an authorized process server who has sworn an affidavit of service. These averments have not been controverted. Indeed, it would appear that as a result of that notice the applicant's brother brought a suit against the respondent to restrain him from selling the suit property (or part of it). The application was dismissed. From the affidavit evidence in this application, *prima facie* the applicant was duly served with statutory notice.

I find nothing in section 74 aforesaid that makes it a requirement that each time there is an intended sale after the previous one fails, the charger must be served with a fresh statutory notice. Indeed that section is clear that the chargee is free to sell the charged property of the chargor fails to pay the money owing three months after a statutory notice has been served upon him (the charger).

As regards the notification of sale, once again *prima facie,* from the annexed notification of sale allegedly served on and signed by the applicant on 27th July 2007, I find that Rule 15(d) of the Auctioneers Rules requiring a notice in writing to the charger of not less than fourty-five (45) days to redeem the charged property was complied with.

I turn to the question of the reserve price. There is a valuation report prepared by Joe Musyoki Consultants Ltd in which the open market value of the suit property is given as Kshs. 19.6 while the forced sale value is stated as Kshs. 12,740,000/=. The report is dated 11th May 2007. All section 77(1) of the Registered Land Act requires a chargee who is exercising his statutory power of sale to do is to act in good faith having regard to the interests of the chargor. He may sell the charged property subject to such reserve price as the chargee himself may deem appropriate.

Once again on a *prima facie* basis the respondent has shown good faith by obtaining valuation before sale and cannot be faulted as the value attached to the property was obtained from a professional valuer.

In the result I find that no *prima facie* case has been made out. Similarly I find no loss incapable of being remedied by an award of damages disclosed.

In a nutshell, this application must fail and is dismissed with costs to the respondent.

Dated and delivered at Meru this 8th..day of February 2008.

W. OUKO

JUDGE