REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 63 of 2007

PATRICK NJIRU……..……..…..…… ……PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD……...……...…1ST DEFENDANT

COFFEE BOARD OF KENYA……...……...……2ND DEFENDANT

R U L I N G

The Plaintiff in this suit filed this Chamber summons application dated 7th February, 2007, simultaneously with the Plaint, seeking injunctive relies under **Order XXXIX rule 1, 2** and **3** of the **Civil Procedure Rules**. Prayers 1 and 2 are moot. In prayer 3, the Plaintiff seeks the following order:

"***That pending the hearing and determination of this suit an injunction be and is hereby issued restraining the 1st Defendant, by itself or through its agents, servants, auctioneers from selling by public auction, private treaty or in any other manner whatsoever and howsoever transferring the Plaintiff's interest in Land Title Number Gaturi/Gtihimu/1124."***

The application is based on four grounds cited on the fact of the application in the following terms:

(a) The intended sale of Land Title Number Gaturi/Githimu/1124 by the 1st Defendant is illegal for non-compliance with the express provisions of the Registered Lands Act relating to statutory notice.

(b) The Plaintiff does not owe the 1st Defendant any money out of the lending arrangement between the parties.

(c) In the event that the Plaintiff's accounts reflect any balance unpaid, the same is recoverable from the 2nd Defendant due to the tri-partite arrangement that existed between the parties at the time of the lending.

(d) That it is just and equitable that the injunction orders sought be issued.

The application is supported by the affidavits sworn by the Plaintiff, the first one dated 7th February, 2007 and a supplementary affidavit dated 1st April 2007.

The application is opposed. The 1st Defendant, Co-operative Bank of Kenya Limited, through **DAN WANYAMA,** an officer in the Risk Division of the bank swore a replying affidavit dated 22nd March, 2007 and filed on 23rd March 2007.

The application was also opposed by the 2nd Defendant, Coffee Board of Kenya, even though no prayers are sought against it. The Senior Executive Officer with the 2nd Defendant, **Kenneth Kemosi Atunga**, swore a replying affidavit dated 12th February, 2007.

I have considered the application together with the affidavits by both the Applicant and the Respondents to this application. I have also considered submissions by **Mr. Ongoya** for the Applicant, **Mr. Kimondo** for the 1st Defendant Bank and **Mr. Otieno** for the 2nd Defendant. There are only two issues for determination and that is whether the Defendant Bank served the Statutory Notice of Sale upon the Applicant and whether the injunction sought should lie.

Before considering the issues raised, it is important to note that the Applicant charged his property in favour of the 1st Defendant, as security for banking facilities he sought for and was granted by the bank. The suit property is registered under the **Registered Land Act** (RLA) and therefore the principle law is the Registered Land Act. None of the parties relied on any case law except the notorious case of **Giella vs. Cassman Brown [1973] EA 358**, which deals with injunctions.

Under **Section 74 (1)** of **RLA**, a chargee cannot exercise its Statutory Power of sale unless it has served the mandatory three months statutory notice. The said section stipulates as follows:

"***S.74(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be".***

Several courts have interpreted the requirements of service under **Section 74(1)** of **RLA**. In **Milimani HCCC No. 5 of 2001, Stephen Obadiah Kariuki Njoroge vs. Euro Bank Limited and others, Mbaluto, J.** held:

"***Service of statutory notice of sale is a prerequisite for the lawful exercise of the mortgagers statutory power of sale. It is trite that where the mortgager denies receipt of notice, service of the notice must be proved…***

The evidence contained in Mr. Ndambuki's affidavit shows that the notice required to be served upon the Plaintiff was posted to him at the address given in the charge document. In my view that constitutes satisfactory evidence of good service in terms of S.3(5) of the interpretation and General Provisions Act and consequently the complaint by the Plaintiff that the notice required to be served under S.74 of the RLA was not so served lacks substance."

In a Court of Appeal decision **Trust Bank Limited vs. Kiran Ramji Kotedia CA No. 61 of 2000, Omolo, Bosire and O'Kubasu JJA** dealing with service under **S.74** of **RLA** held: -

"***If the notice had been sent by registered post, all the appellant would be obliged to show was that the notice was in fact sent by registered post and that the same was returned to it through the post."***

Going by the two cases I have enumerated above, what appears to be the general principle or rule in regard to service of notice issued under **S.74(1)** of **RLA** is that once there is evidence that the notice was sent by registered post, to the mortgagors last known postal address, and where there is no evidence that the notice was returned, then the chargee or mortgagee will have proved service as required under that section.

In regard to the Statutory Notice served under **S.74(1)** of the Act, the Plaintiff deposes in his supplementary affidavit that it was posted to Postmaster Embu who gave him a note, PN-S-1 indicating that the letter, which was Parcel No. 326393, was returned to the Postmaster Nairobi. The Plaintiff deposes further that the Postmaster Nairobi gave him a note PN-S-2 confirming that the letter Parcel No. 326393 was returned to GPO Nairobi and collected by **Gladys Kiptui** on behalf of the Co-operative

Bank.

The 1st Defendant, the Co-operative Bank of Kenya, has not filed any reply to the Plaintiff's supplementary affidavit. That in effect means that the Plaintiff's averments that the Statutory Notice, posted to his address in Embu, was returned unclaimed to the 1st Defendant, is not controverted. There being no evidence to controvert the Plaintiff's evidence, or documentary proof to raise any doubts as to the authenticity of PN-S-1 and PN-S-2, the Plaintiff's evidence that the Statutory Notice of sale did not reach him has not been controverted. In my view, the Plaintiff's evidence is satisfactory to prove that the Statutory Notice was not received by him and therefore, the service of the notice was not complete and did not meet the requirements of **S.74(1)** of **Registered Land Act**.

The 1st Defendant's Advocate, **Mr. Kimondo**, has tried to argue that the Plaintiff's contention that he never received the mail was mischievous, is neither here nor there. Had the 1st Defendant wished to challenge the Plaintiff on the issue of notice it ought to have filed papers to that effect. It cannot be heard to read mischief in the Plaintiff's averment that the notice was returned to the 1st Defendant. In any event, the notice is alleged to have been collected by its own staff whose full names are given. If it had any case, it ought to have put in evidence to controvert the Plaintiff's claim. The 1st Defendant's submission in that regard is therefore a weak attempt to deny the Plaintiff's evidence that the notice was never served.

Mr. Kimondo drew the courts attention to the descriptions given in the Plaintiff's affidavits sworn in support of the application. **Mr. Kimondo** took issue with the fact that the Plaintiff did not give his postal address. I agree with **Mr. Ongoya** that the error in description of the Plaintiff complained of is a defect in form which is excusable under **Order XVIII Rule 7** of **Civil Procedure Rules** which stipulates as follows: -

"7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof."

That defect is merely of form and cannot be used to deny the Plaintiff of his rights.

The other issue to determine is whether the Plaintiff is deserving of the order of interlocutory injunction sought. The 1st Defendant intended to sell the Plaintiff's land in exercise of its Statutory Power of Sale on 15th February, 2007. That is one year ago. This court has still to determine whether an injunction should issue.

Mr. Ongoya for the Applicant did not make any submissions geared to justifying the issuance of an injunction in the matter. What counsel urged is that the intended sale of the applicant's land should be stopped for lack of requisite notices. The sale was to take place one year ago and need not be stopped as it has been overtaken by events. The Applicant needed to demonstrate that it has a prima facie case to justify an injunction being granted pending the hearing and disposal of the suit. In the alternative the Applicant needed to demonstrate that it would suffer substantial loss, which cannot be compensated by an award of damages, if the injunction sought was not granted. If the court were unable to determine the application on the basis of these two principles, then the Court is mandated to determine the matter on a balance of convenience. See **Giella vs. Cassman Brown & Co. [1973] EA 358**.

I note from paragraph 3, 10, 11 and 14 of the supporting affidavit dated 7th February, 2007 that the Applicant deposes to conditions upon which the 1st Defendant approved the loan. According to him, the 1st Defendant was to release funds to the Applicant and the Applicant was to repay the loan through Coffee sales. In turn the Applicant was to deliver coffee to the only milling body then, Kenya Planters Corporation Union (KPCU) for milling of the coffee. The KPCU was then required to deliver the milled coffee to the 2nd Defendant, Coffee Board of Kenya, the sole body which markets Kenya coffee abroad. Out of the proceeds of the coffee, the 2nd Defendant was to pay funds directly to the 1st Defendant.

The Applicant has annexed PN4, which are **OUT TURN STATEMENTS** made to the 1st Defendant in support of weight and value of coffee delivered out of the Applicant's supply to KPCU, to the 2nd Defendant. It was after the 2nd Defendant sold the coffee that it remitted the proceeds to the 1st Defendant.

At paragraph 12 and 16 of the Affidavit, the Applicant deposes that out of all coffee delivered to the 2nd Defendant, he is owed an amount of Kshs.450,000/-

The 1st Defendant, in its replying affidavit has admitted paragraphs 10 and 11 of the Applicant's affidavit. In regard to paragraph 12, the 1st Defendant deposes that it had no role in the delivery of coffee to KPCU or Coffee Board of Kenya. In answer to paragraph 16 the Defendant denies that any money is owed to the Applicant and deposes that in fact it was the Applicant who owed it Kshs.1,330,529/30. The 1st Defendant has annexed a statement of Account, DW2 showing the Applicant's debt balance as at 22nd March 2007 as 985,490/05.

The 1st Defendant has annexed DW5, Application for Stabex Funds by the Applicant, in which the conditions for the banking facility granted to the Applicant is shown. It shows as follows in part: -

"***3. Disbursements.***

To be made against out turn statements given by the miller. The funds will be drawn from a chervy Advance overdraft account maintained by using your name.

4. Repayment: from Coffee proceeds/sales until the overdraft is fully repaid.

6. Undertaking: You shall undertake

(a) To open and operate an account at the Co-op Bank of Kenya Limited for receiving coffee payments fro the marketing agents and so as to meet your repayment obligations.

(b) ….

(c) …"

The above conditions are in tandem with the Applicant's affidavit concerning the mode of disbursements of the funds from the 1st Defendant and the mode of repayment through the 2nd Defendant. The document, DW2, does not advance the 1st Defendant's case but actually strengthens the Applicant's position that disbursements by the 1st Defendant to the Applicant was pegged to Out Turn Statements from the Miller (KPCU) and the repayments by the 2nd Defendant upon sale of the coffee. In any event the Applicant replied to these allegations in the supplementary affidavit dated 10th April, 2007.

The 2nd Defendant, through its Senior Executive Officer, has denied handling any coffee produce from the Plaintiff in the year 2002 and denies being the sole marketer of coffee after the enactment of the Coffee Act 2001 on 1st April 2002.

This affidavit does not seem to have been responded to by the Applicant. It is likely that it was never served on them as the record is clear there was no affidavit of service in its respect. Be that as it may, the facts in issue in this matter are weighty and need a serious consideration and the careful weighing of evidence. They are matters which cannot be resolved in an interlocutory application such as this one. However, on a *prima facie* basis, the Applicant has demonstrated a case to the extent that although he obtained finances from the 1st Defendant, the repayment process involved several other parties and marketing overseas which were beyond the Applicant's control. That being the case, I think that it would be important to preserve the suit property until the suit is resolved. The 1st Defendant will not suffer any

prejudice since the suit property will still be available to it, if the Applicant looses the suit.

Conversely if the injunction is declined and the Applicant wins the case, it may not be possible to return him to his current position by way of an award in damages. In **Muiruri vs. Bank of Baroda (K) Limited [2001] KLR 183, Kwach, Bosire** and **Ole Keiwua, JJA,** observed as follows: -

"***But will the appellant suffer such damage as may not be compensated in damages unless she is granted an injunction. The suit property is land. Mr. Nyamu submitted before us that the said property is commercial land therefore its loss is compensatable in damages, we have no clear evidence on the status of the land. Consequently, there is no proper basis for holding that it is commercial property. Besides disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.***

In the circumstances, the balance of convenience favours the grant of an injunction to maintain the status quo, so as to give the appellant an opportunity of proving her case."

For the foregoing reason, in exercise of discretion on a balance of convenience, I will grant the Applicant's application dated 7th February, 2007 in the following terms.

1. Pending the hearing and determination of this suit, the 1st Defendant be and is hereby restrained from selling the suit property.

2. The 1st Defendant will meet the costs of this application.

Dated at Nairobi, this 12th day of March, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Ongoya for the Applicant

Mr. Kisaka holding brief Mr. Kimondo for the Bank

No appearance for the 2nd Defendant

LESIIT, J.

JUDGE