



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

**Civil Suit 630 of 2007**

**PETER WAKABA MERIA.....1<sup>ST</sup> PLAINTIFF**

**PAULINE NGINA WAKABA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO. OF KENYA LTD.....DEFENDANT**

**R U L I N G**

The plaintiffs filed suit seeking the following declaratory orders of this court. They sought a declaratory order that the intended sale of their property i.e. **Nakuru/Langa Langa Block 1/299** (*hereinafter referred to as the suit property*) by the defendant be declared wrongful, illegal and invalid. The plaintiffs further sought for this court to declare that the plaintiffs were not served and or not properly served with the requisite statutory notices as required under **Sections 65 (2) and 74** of the **Registered Land Act**. The plaintiffs further sought an order of permanent injunction to restrain the defendant from selling, alienating or transferring the suit property. Contemporaneous with filing the suit the plaintiffs filed an application for injunction under **Order XXXIX Rules 1 & 2** of the **Civil Procedure Rules** seeking orders of this court to restrain the defendant from selling, alienating or transferring the suit land pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The plaintiffs contend that they were not served with the requisite statutory notices under **Section 65 (2)** and **Section 74** of the **Registered Land Act**. The plaintiffs further contend that the defendant acted in bad faith as regard the sale of the suit property contrary to the requirements of **Section 77** of the **Registered Land Act**. The application is supported by the annexed affidavit of Peter Wakaba Meria, the 1<sup>st</sup> plaintiff.

The application is opposed. Joseph Kania, the manager legal services of the defendant swore a replying affidavit in opposition to the application. In summary, he deponed that the plaintiffs were granted a loan facility secured by the suit property; the plaintiffs defaulted in repaying the amount advanced; the defendant sought to realize its security in accordance with the charge; that the defendant issued the requisite statutory notices to the plaintiffs by serving them by registered post to their last known postal address; that the plaintiffs had frustrated the defendant from realizing the said security; that the plaintiffs filed a suit in Nakuru, obtained orders of injunction, stopped the intended sale by public auction, and then withdrew the suit before it could be heard and determined on merits; that the rate of interest charged was in accordance with the agreement contained in the charge instrument and further in accordance with the prevailing market rates; that the plaintiffs had acknowledged owing the amount claimed by the defendant; and finally that the plaintiffs did not have a case which would enable this court grant the interlocutory injunction sought.

Mrs. Othieno for the plaintiffs reiterated the contents of the plaintiffs' application and the supporting affidavit thereto. She also relied on several decided cases. She made the following case on behalf of the plaintiffs; that no statutory notice was issued to the plaintiffs as required by law; that there was no credible evidence to support the contention by the defendant that it had served the requisite statutory notices; that the documents annexed to the replying affidavit did not definitively establish that the plaintiffs were served with the statutory notice by registered post; that it was "*most probable*" that taking into consideration the said entire supporting documents that the statutory notices were not served to the

plaintiffs as contemplated by the law; that while it was conceded that the auctioneer had properly served the redemption notice, the same could not be said of statutory notices purported to have been served by the defendant; that the defendant had acted in bad faith in the exercise of its statutory power of sale contrary to the provisions of **Section 77** of the **Registered Land Act**; that the defendant had charged the plaintiffs interest that was excessive; that the plaintiffs had recalculated the interest which ought to have been paid and found that the defendant had charged a higher interest rate than contemplated in the charge instrument; that even if the defendant were to sell the suit property it could not realize the amount owed; and finally that the plaintiffs had satisfied the principles for the grant of interlocutory injunction and therefore the application should be granted as prayed.

In response, Mr. Munge relied on the replying affidavit sworn on behalf of the defendant and the list of decided cases filed in court. He made the following case on behalf of the defendant: that the plaintiffs had failed to satisfy the principles for the grant of interlocutory injunction as laid down in the case of **Giella –vs- Cassman Brown**; that the plaintiffs had admitted securing a loan from the defendant on the strength of security of the suit property which was charged; that the charge instrument had not been challenged; that the plaintiffs had severally admitted being indebted to the defendant and made several proposals to pay the amount owed which proposals they failed to adhere to; that the defendant properly served the statutory notices to the plaintiffs by registered post through their last known postal address; that the plaintiffs had previously filed suit in Nakuru where they had obtained *ex parte* orders of injunction. In the said suit, the plaintiffs made no allegation that they had not been served with the requisite statutory notices; that the application was brought in bad faith as the plaintiffs had failed to disclose material facts to the court, particularly the existence of the previous suit which had been filed at Nakuru; that the defendant had charged interest in accordance with the agreement as contained in the charge instrument. In any event, it was argued that a dispute over the amount owed could not be a basis for the grant of interlocutory injunction; and finally that the plaintiffs had not made any offer to repay the amount which they still owed the defendant. Mr. Munge urged the court to dismiss the application with costs.

I have read the pleadings filed by the parties in support of their respective positions in this application. I have carefully considered the rival submissions made by counsel for the plaintiffs and counsel for the defendant. The issue for determination by this court is whether the plaintiffs established a case to enable this court grant the order of interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an order of interlocutory injunction are well settled. In **Michael Gitau –vs- Pamela Salvage & 4 others CA Civil Appeal No. 244 of 1999 (Nairobi)** (*unreported*), the Court of Appeal held at page 7 of its judgment as hereunder:

*“The principles which guide the court in dealing with such an application are well settled and are clearly spelt out in the often cited case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A. 358**. The applicant must first show he has a *prima facie* case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed that damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.”*

In the present application, certain facts are not in dispute. It is not disputed that the plaintiffs borrowed money from the defendant. They charged the suit property to secure an amount of KShs.650,000/=. The instrument of charge has not been challenged by the plaintiffs. The plaintiffs defaulted in repaying the amount advanced together with the accrued interest.

It was contended on behalf of the plaintiffs that the requisite statutory notices were not served upon the plaintiffs before the defendant sought to exercise its statutory power of sale. On the other hand, it was argued on behalf of the defendant that the required statutory notices were served upon the plaintiffs by registered post through their last known postal address. I have perused the correspondence which the defendant annexed in support of its contention that it had served the required statutory notices to the plaintiffs. The defendant annexed a copy of statutory notice dated the 7<sup>th</sup> February, 2006 as annexure “JK1” page 23. The said notices were separately sent to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs by registered post

together with other letters on the 15<sup>th</sup> February, 2006. There is a schedule confirming that the said letters were sent by registered post.

Although the plaintiffs contest receiving the said notices, upon analyzing the facts of this case as evidenced by the affidavits sworn and annexures thereto, it is clear to this court that the plaintiffs were properly served with statutory notices as required by **Section 65 (2)** and **Section 74** of the **Registered Land Act**. It was instructive that when the plaintiffs were served with the redemption notice by Legacy Auctioneering Services pursuant to **Rule 15 (d)** of the **Auctioneers Rules 1997**, the plaintiffs wrote to the defendant requesting the defendant to allow them to sell the suit property by private treaty (see annexure “JK1” page **20, 21 & 22**). I therefore find no merit with the argument by the plaintiffs that they were not issued with the requisite statutory notices.

On whether this court can grant an injunction where the amount owed is disputed it has been held by various courts that a dispute on the amount owed cannot constitute a valid ground to prevent a chargee from exercising its statutory power of sale. If the plaintiffs wish to dispute the amount claimed by the defendant, they are at liberty to seek an appropriate remedy from court. Further, the fact that after the exercise of the statutory power of sale some amount will still be owed by the plaintiffs is not sufficient reason for this court to impeach the exercise of the said statutory power of sale by the defendant.

It was evident from the facts of this case that the plaintiffs have been unable for a very long time to settle the outstanding debt due to the defendant. In their desperation, the plaintiffs have abused the due process of the court by filing a suit for the sole purpose of preventing the defendant from exercising its statutory power of sale by selling the suit property in a public auction. The plaintiffs obtained an ex parte interlocutory order of injunction before the subordinate court at Nakuru. The said application was not heard inter partes. Before the application was heard, the plaintiffs withdrew the suit. The plaintiffs have now filed the present application under similar circumstances. They did not disclose to the court what they had done before the suit at Nakuru was withdrawn. It is clear to this court that the plaintiffs are seeking the exercise of discretion by this court on grounds of sympathy and not of law.

The upshot of the above reasons is that the plaintiffs have failed to establish a prima facie case. Their contention that they were not served with the requisite statutory notices was disproved by the defendant. The other grounds put forward by the plaintiffs are not grounds which this court can consider when determining whether or not to grant an application for interlocutory injunction. It is unnecessary for this court to consider the other principles in **Giella – vs – Cassman Brown**. The plaintiffs failed to cross over the first hurdle by establishing that they had a prima facie case. The plaintiffs’ application dated 4<sup>th</sup> December, 2007 lacks merit and is hereby dismissed with costs.

**DATED** at **NAIROBI** this 5<sup>th</sup> day of **MARCH, 2008**.

**L. KIMARU**

**JUDGE**