



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 85 of 2008**

JOSEPH MWANGI KARIUKIPLAINTIFF

VERSUS

EQUITY BANK LIMITED1ST DEFENDANT

PETER M. MWANGI T/A CASH CROP AUCTIONEERS..2ND DEFENDANT

RULING

In the Chambers Summons under Order 39 rules 1, 2, 3 of the Civil Procedure Rules the applicant seeks two main prayers namely:

(2) THAT this Honourable Court be pleased to issue orders of temporary injunction restraining the 1st and 2nd defendants by themselves and/or by their employees servants and/or agents from causing and/or carrying out the alienation, sale and/or disposal by way of public auction scheduled for 22nd February 2008 or such other date or by any other means whatsoever selling, alienating and/or disposing the Plaintiff's land LOC 16/KIMANDI WANYAGA/837 pending hearing and determination of this application and/or the further orders of court.

(3) THAT this Honourable court be pleased to issue orders of temporary injunction restraining the 1st and 2nd Defendants by themselves and/or by their employees servants and/or agents from causing and/or carrying out the alienation, sale and/or disposal by way of public auction or by any other means whatsoever selling, alienating and/or disposing the Plaintiff's land LOC 16/KIMANDI WANYAGA/837 pending the hearing and determination of the Plaintiff's suit herein.

The grounds in support of the application are:

(a) THAT the Plaintiff is the registered owner of the suit land herein which land he charged to the 1st Defendant in or about 31st August 2005 under a contract of guarantee to secure a loan advance made by the 1st Defendant to one Lucas Muchiri Ndirangu.

(b) THAT the guarantee and indemnity executed by the Plaintiff in favour of the 1st Defendant was limited to the sum of Kshs.300,000.

(c) THAT on 8th December 2007, the second Defendant served the Plaintiff with a "Notification of Sale" and "45 days redemption Notice" the purport and effect of the said documents being that the Plaintiff's land shall be sold by public auction on 22nd February 2008.

(d) THAT the 1st Defendant has not at any one time served the plaintiff with a statutory notice

pursuant to S 74 of the Registered Land Act and therefore the 1st Defendant's power of sale has not crystallized.

(e) THAT the Defendants' action in seeking to realize the security herein are tainted with illegality and are void ab initio and the auction sale of the Plaintiff's land scheduled for 22nd February 2008 is illegal and urge this Honourable to stop the same.

The application is supported by the affidavit of the Plaintiff and he avers that he is the registered owner of the suit property which was charged on 31st August, 2005 to the 1st defendant. He states that he guaranteed a loan by the 1st defendant to one **Lucas Muchiri Ndirangu** and the guarantee was limited to the sum of Kshs.300,000/=. He states that on 8th December 2007, the 2nd defendant duly instructed by the 1st defendant served upon him a notification of sale and 45 days redemption notice. He avers that the effect of the notification that the suit property would be sold by public auction on 22nd February, 2008 to recover a sum of Kshs.450,061.05 due to the 1st defendant by the principal debtor **Lucas Muchiri Ndirangu** in contravention of the contract with the 1st defendant in which he guaranteed a limited sum of Kshs.300,000/=. It is the contention of the applicant that he was not at any one time issued and/or served with the statutory notice which is a mandatory requirement by the law therefore, the 1st defendant's power of sale in regard to the suit land cannot crystallize in the absence of mandatory 3 months' notice served.

The 1st defendant filed a replying affidavit through **Leakey Wanjau** who is the legal officer of the 1st defendant. He states that the 1st defendant is entitled to recover the amount in excess of the limit specified in the guarantee after it has demanded from the plaintiff. And in paragraph 6 he states;

“THAT contrary to the allegations contained in paragraphs 8 and 9 of the Supporting Affidavit the Plaintiff herein was served with the requisite Statutory Notice via registered post. Annexed hereto and marked “LW2” is a copy of the Statutory Notice issued dated Friday 15th June, 2007”.

A simple question in this matter is whether the 1st defendant had served the mandatory 3 months' notice in line with the provisions of section 74 of the Registered Land Act Cap 300. In my understanding the thrust of the plaintiff's case is that the bank's power of sale has not crystallized for its failure to serve a mandatory power of sale before it could realize the property. An injunction would issue as against the defendants restraining them from selling the suit land until there is evidence that the statutory power of sale has been exercised properly. The plaintiff does admit having received at the 1st defendant's instance a notification of sale and 45 days redemption notice. But the plaintiff denies having been served with requisite mandatory statutory notice as per the provisions of section 74 of the Registered Land Act. The law is that a chargor's power of sale does not crystallize before the required statutory notice is served and that non-service of such notice is fatal to the exercise of the power of sale. It means the power of sale is only exercisable if a valid notice is served and any other process outside the notice would be void.

In my humble view the equity of redemption cannot be extinguished unless and until a valid notice is served upon the chargor stating that his property would be sold after the lapse of three months. There must be evidence to show that three months period had lapsed after service before the property could be sold.

In HCCC NO.1678 of 2001 Samuel Kiarie Muigai v Housing Finance Company of Kenya and another Ringera J as he was then held;

“I first ask myself whether the chargor has a prima facie case with probability of success under trial. In determining that I must bear in mind that I should not make definite findings of facts and law at this stage and particularly so where the affidavit evidence is contradictory. The case the plaintiff has to prove at the trial is that he was not served with valid statutory notice under section 74 RLA and an Auctioneers notification of sale under rule 15 (d) of the Auctioneers Rules and that such non-service was fatal to the exercise of the statutory power of sale by the chargee and it was not a default whose remedy was merely

in damages under the provisions of section 77(3) of the RLA. Has the plaintiff made a prima case to that effect? First the notice required by section 74 RLA must be one which requires the chargor to pay the money within three months of the date of the service thereof”.

The 1st defendant alleges the requisite statutory notice was served via through the registered post and in evidence the bank attached a copy of the statutory notice dated 15th June, 2007. Having gone through the documents, there is no evidence to show that the said statutory notice was ever sent through a registered post. Secondly there is no evidence that it was served and/or received by the plaintiff. In my view the bank should have gone a step further to annex the certificate of posting that was issued by the Post Office on the date of positing the statutory notice by way of registered post as is claimed. I agree with the Advocate for the applicant that the bank’s failure to annex the certificate of posting only goes to confirm that indeed the plaintiff was not served with the requisite and mandatory statutory notice. I therefore think that the assertion by the plaintiff that he was not served with the requisite statutory notice contrary to the provisions of section 74 of RLA is a prima facie issue which entitles him an order of injunction. In my humble view non-service of valid statutory notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor’s equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit property amounts to illegality.

As stated the plaintiff had specific statutory right to be served with a proper notice under the provisions of section 74 of RLA. There is evidence to show that such was omitted by the bank and in my humble view a party who is entitled to protection of the law cannot be made to take damages in lieu of his rights therefore the issue of damages cannot be a ground to refuse the plaintiff his entitlement to an order of injunction. The fact that the bank is in a position to compensate the chargor for his loss in damages cannot be a substitute for the statutory protection which the plaintiff must be accorded by virtue of the defendant’s contravention of the law.

Lastly I am satisfied that the balance of convenience tilts in favour of maintaining the status quo so that no party is in a position to defeat the right of the other. The 1st defendant would indeed be entitled to give the requisite statutory notice if there is a debt which the plaintiff is entitled to repay. And since that was not done, I think it is in the interest of both parties to ensure proper procedure is followed before any attempt is made to exercise the statutory power of sale.

In conclusion I am satisfied that the Plaintiff is entitled to the orders sought in the application under my determination which is hereby granted. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 23rd day of April, 2008.

M. A. WARSAME

JUDGE