



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Suit 55 of 2007

**GERALD P. OKECH ONYANGO .....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED..... DEFENDANT**

**RULING**

The application by the plaintiff is made under Order XXXIX Rule 1, 2, & 3 of the CPR, Section 3A and 63 (e) of the Civil Procedure Act and is for the basic order that pending the hearing and determination of this suit the defendant be restrained either by itself, servants, agents or any other persons acting on its behalf from advertising for sale, selling off or in any other way disposing off the property known as **L. R. NO. NAIROBI/BLOCK 82/759 GREENFIELDS ESTATE PHASE II**. The ground on which the application is anchored are as follows:-

- (1) The defendant is unilaterally, unlawfully and without any colour of right seeking to advertise and sell the plaintiff's property known as LR. NO. NAIROBI/BLOCK 82/759 GREENFIELDS ESTATE PHASE II.**
- (2) The debt for which the plaintiff is seeking to exercise its alleged statutory power of sale was not the subject of any charge, but a personal guarantee, which can only be enforced by suit.**
- (3) No statutory notice of intended advertisement for sale has been served upon the plaintiff.**
- (4) The plaintiff did not sign any further charge for additional facilities extended by the defendant**

The grounds are enhanced and fortified by the supporting affidavit dated 8<sup>th</sup> May 2007 and further affidavit dated 23<sup>rd</sup> October 2007 both deponed by the plaintiff **GERALD PORTALS OKECH ONYANGO OF P. O. BOX 9239, KISUMU** and are opposed on the basis of the facts contained in a replying affidavit dated 3<sup>rd</sup> October 2007 deponed by the defendant's legal officer **PURITY RAARIA OF P. O. BOX 30120-00100 NAIROBI**.

The brief facts of the plaintiff's case are that in the year 1986 while employed by the defendant bank the plaintiff did borrow a sum of Kshs. 400,000/= towards the purchase of the suit property **LR. NO. NAIROBI /BLOCK 82/759 GREENFIELD ESTATE PHASE II** and did create a charge over the property in favour of the defendant as security for the borrowing. He retired from his employment with the defendant in the year 1997 having discharged all his liabilities to the defendant from amounts due to

him for the period worked. The liabilities included the aforementioned amount of Kshs. 400,000/=. Thereafter in the year 2000 the plaintiff applied for and was granted a business loan of Kshs. 2 Million by the defendant for him firm known as **NYOPALA ENTERPRISES**. He failed to adequately service the debt and agreed with the defendant to have the suit property valued and sold by private treaty to repay the loan. However, contrary to the agreement, the defendant instructed a firm of auctioneers i.e. **GARAM ENTERPRISES** to serve a notification of sale and eventually sell the suit property by public auction. The plaintiff therefore filed the present suit contending that the defendant's action is arbitrary unlawful and unjustified in that no charge or further charge was executed as security for the business loan and that no statutory or any notice was served upon himself prior to the service of the aforesaid notification of sale. And by this application the plaintiff is seeking a temporary injunction to issue against the defendant pending the hearing and final determination of the suit.

Order XXXIX of the Civil Procedure Rules generally provides for temporary injunction and interlocutory orders and so does Section 63( c) and (e) of the Civil Procedure Act. The inclusion of Section 3A of the Civil Procedure Act was therefore unnecessary in this application. A temporary injunction is an equitable remedy. It's grant or refusal is left at the discretion of the court. However, the guidelines for grant or refusal of such an injunction were set out in the leading decision of **GIELLA =vs= CASSMAN BROWN & CO LTD [1973] E. A. 358** as follows:-

- (i) An applicant must show a prima facie case with a probability of success**
- (ii) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated in damages.**
- (iii) If the court is in doubt it will decide an application on the balance of convenience.**

Having considered the application, the opposition thereto and the lengthy and learned submissions made by the plaintiff's counsel Mr. Aboge and the defendant's counsel Mr. Odundo it becomes apparent that the basic issue arising at this juncture is whether the plaintiff has shown a prima facie case with a probability of success. In other words, can the plaintiff's case be at first sight accepted as it is until proved otherwise??.

The thrust of the plaintiff's case is that he went into business after retirement and formed a company under the name and style of **NYOPALA ENTERPRISES**, which through him obtained a business loan of Kshs. 2 Million in the year 2000. The loan was secured by a personal guarantee and not a charge or further charge over the suit property. The plaintiff contends that it is this business loan, which is the foundation of this suit and not personal borrowing made earlier by himself and secured by the appropriate charge and further charge. Therefore, the defendant's intended on purported exercise of statutory rights is unlawful and if lawful was not preceded by a valid and proper service of the prerequisite statutory notice. The plaintiff also contends that in the purported exercise of the said right the defendant instructed a firm of auctioneers who contravened the Auctioneers Rules by failing to issue a redemption notice.

For the defendant, it was argued that the plaintiff obtained personal loans amounting to a total of Kshs. 2.5. Million which were secured by a charge over the suit property dated 8<sup>th</sup> May 1987 and a further charge dated 2<sup>nd</sup> October 1996. The defendant contends that the loans were not secured by the plaintiff's personal guarantee but by the said charge and further charge and as a result it had the right to exercise the accruing statutory power of sale and to that end it duly issued and served the requisite statutory notice dated 31<sup>st</sup> October 2006. Although the plaintiff indicates in paragraph 4 of his supporting affidavit that the suit property was purchased in 1976 with a loan from the defendant the transfer of lease dated 8<sup>th</sup> May 1987 (Annexure PR I in the replying affidavit) shows that the property was acquired in 1987 and not 1976, which is clearly an error.

Be that as it may, the exercise of the statutory power of sale by the defendant meant that it was merely enforcing its right on the basis of the aforementioned charge and the further charge and not on the basis of a personal non existent guarantee. The subject matter of this case is undoubtedly the operating charge

instruments i.e. the charge dated 8<sup>th</sup> May 1987 (See Annexure marked PR II in the replying affidavit) and the further charge dated 2<sup>nd</sup> October 1996 (See Annexure marked PR III in the replying affidavit). Both instruments show that they were executed by the plaintiff in his personal capacity as the chargor. Both relate to the one and only suit property L. R. No. NAIROBI / BLOCK 82/758 and both do not feature a firm or company known as Nyopala General Enterprises Ltd or Nyopala Enterprises. These proceedings have everything to do with the said charge and further charge and nothing to do with Nyopala General Enterprises or Nyopala Enterprises. It would appear that the banking facilities granted by the defendant to the said firm or company in the year 2000 (See annexure GPO 4 (a) in the further supporting affidavit) were a new and independent arrangement which did not invalidate and / or discharge the existing charge and further charge over the suit property. This explains why a discharge of charge and further charge was never executed and the title documents to the suit property remain with the defendant. This further explains why the defendant deemed it fit and lawful to exercise its statutory power against the plaintiff chargor. However, prior to the exercise of the power of sale, the defendant was required to fulfil legally set and specified procedural requirements.

Such requirements would include the issuance and service of the statutory notice. The defendant did issue a statutory notice dated 31<sup>st</sup> October 2006 (Annexure PR VI in the replying affidavit). The question is whether the same was served upon the plaintiff. In the case of **NYANGILO OCHIENG & ANOTHER =vs= FANUEL B. OCHIENG & OTHERS C/APP No. 148/95 AT KISUMU** which was cited herein by learned counsels for the plaintiff and the defendant the court of appeal had the following to state on statutory notice :-

**“ It is trite law that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74 (i) of the registered land Act (Cap 300, laws of Kenya). This section obliges the chargee to serve by registered post, the relevant statutory notice. Three months after the chargers receiving such notices the bank’s power of sale arises. This is the basis upon which the bank can put up the properties for sale”.**

The court of appeal also stated the following:-

“ It is for the chargee to make sure that there is compliance with the requirements of Section 74 (i) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”

Further the appeal court noted:-

“..... it must be understood that in the face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting”.

Herein, the defendant’s statutory notice dated 31<sup>st</sup> October 2006 is said to have been forwarded to the plaintiff under certificate of posting through P. O. Box 59111 – 00200 NAIROBI. The plaintiff has denied receipt of the statutory notice and indicated that he no longer uses P. O. Box 59111-00200 NAIROBI and had notified the defendant of his change of address to P. O. Box 9239 KISUMU. He pointed out that the charge documents refer to his address as P. O. Box 30120, NAIROBI. However, the charge documents show that the address belongs to the defendant and that the plaintiff’s address was given as P. O. Box 20311 NAIROBI. The reference to P. O. Box 30120 as belonging to the plaintiff is most probably a typographical error. Viewed along side the facts and annexures produced in this application, it becomes apparent that the issue relating to service of the statutory notice has to be fully examined and proved in the trial. On that basis alone it may safely be stated that the plaintiff has established a prima facie case for the court to exercise discretion in his favour.

Consequently, the application is granted in terms of prayer (b) of the Chamber Summons dated 8<sup>th</sup> May 2007. The plaintiff shall be entitled to the costs of the application.

Ordered accordingly.

**Dated and signed at Kisumu this 15<sup>th</sup> day of April 2008.**

**J. R. KARANJA**

**JUDGE**

JRK/ao