



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 415 OF 2006

PEPONI VALLEY LIMITED.....PLAINTIFF

-VERSUS-

NATIONAL INDUSTRIAL CREDIT BANK LTD.....DEFENDANT

RULING

The plaintiff filed suit against the defendant seeking various reliefs from the court relating to the charges in respect of the plaintiff's properties known as **LR Nos.2951/322, 2951/350, 2951/356 and 2951/357** (*hereinafter referred to as the suit properties*). Contemporaneous with filing suit, the plaintiff made an application under the provisions of **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules, Section 3A and 63** of the **Civil Procedure Act** and **Section 52** of the **Transfer of the Property Act** seeking orders of injunction to restrain the defendant by itself, or by its servants/agents from advertising for sale by public auction or private treaty or otherwise howsoever interfering with the ownership, quiet possession and enjoyment by the plaintiff of the suit properties pending the hearing and determination of the suit.

The grounds in support of the application are on the face of the application. The plaintiff contends that the defendant had purported to exercise its statutory power of sale under the Charge dated 26th August, 1993 and a Further Charge dated the 19th September, 1997 without issuing the requisite statutory notice as prescribed under **Section 69** of the **Transfer of Property Act**. The plaintiff further contends that the Charges upon which the defendant is purporting to sell the suit property were invalid for want of execution by the defendant. The plaintiff states that since the plaintiff had not executed the Charge instruments, it could not purport to exercise a statutory power of sale over the suit properties. The plaintiff further contends that the purported sale of the suit properties by the defendant was illegal since the defendant had failed to comply with the mandatory provisions of **Section 52** of **Transfer of Property Act**. The plaintiff states that it would suffer irreparable damage which could not likely be compensated by an award of damages if injunction is not granted to restrain the defendant from selling the suit properties. The application is supported by the annexed affidavit of Nirish Chandulal Shah.

The application is opposed. Henry Maina, the Assistant Manager – Legal, Debt Management Unit of the defendant company swore a lengthy replying affidavit in opposition to the application. He deponed that the plaintiff had validly charged the suit properties to the African Mercantile Banking Company Limited to secure an amount of Kshs.3,000,000/= which was lent to Hardware Corner Limited. A copy of the said debenture was annexed to the replying affidavit. He deponed that the plaintiff secured a further sum of Kshs.1,000,000/= which was borrowed by Polka Limited. A Further Charge was executed and registered in respect of the suit properties. He deponed that the plaintiff had all along acknowledged being indebted to the defendant and was further aware that the security offered would be in respect of the additional

charged debt and any other debt that would be incurred in the course of the said loan transaction. He deponed that the plaintiff had made proposals on how it intended to settle the amount owed and had even held several meetings with the defendant with a view of settling the debt owed. He reiterated that the defendant had issued the requisite statutory notice by registered post. He annexed copies of a letter dated the 28th January, 2004 as annexure '**HM 8**'. He deponed that the plaintiff was truly indebted to the defendant and any amounts debited to the plaintiff's account were legal and within what was agreed in the debenture, Further Charge and Guarantee and Indemnity executed by the plaintiff, the companies which borrowed the money, and the directors of the plaintiff and the respective companies which borrowed the money. He deponed that the plaintiff had filed the present application to frustrate the defendant from realizing its security after the borrowers had defaulted in repaying the monies advanced and which amount continues to attract interest.

At the hearing of the application, I heard rival submissions made by Mr. Wanjohi for the plaintiff and Mr. Imende for the defendant. The two counsels, apart from citing several decided cases, relied on the facts stated in the application and the affidavits filed by their respective clients. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the order of injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

*"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420.**)"*

In the present application, the plaintiff argued that the defendant did not serve the requisite statutory notice before purporting to exercise its statutory power of sale as provided by **Section 69A (1)** of the **Transfer of Property Act** which provides that:

"A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until –

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service."

The Court of Appeal in **Trust Bank Ltd –vs- Eros Chemists Ltd & Anor. C.A. Civil Appeal No.133 of 1999** held at page 6 of its judgment as follows:

"In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three month's period".

At page 7 of its judgment, the court held as follows:

*"In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice. Without any hesitation, the notice in the **Russell** case threatening a sale of the charged property on a 14 days' notice was an invalid notice for accrual of a right of sale."*

In its defence, the defendant argued that it had served the requisite statutory notice as contained in annexure 'HM8'. It was submitted on behalf of the defendant that the said statutory notices were served by Palomino Agencies, the auctioneers who were instructed to realize the security as comprised of the charged properties on behalf of the defendant. It was further submitted that the said auctioneer had sent the requisite statutory notice by registered post as evidence by the certificates of posting annexed to the replying affidavit of the said Henry Maina. I have perused the said purported notice. It is clear to this court that the notices referred to by Palomino Auctioneers vide their letter dated 28th January, 2004 refer to the 45 day notice that an auctioneer is required to issue pursuant to **Rule 15** of the **Auctioneers Rules, 1997**. It is evident that the said notice was not a statutory notice as envisaged by **Section 69A (1)** of the **Transfer of Property Act**. Rather, it was the notice which an auctioneer is supposed to issue to the registered owner of the property before he can proceed to sell the property pursuant to an instrument of mortgage. This is a last notice that is issued to the registered owner of a charged property before the property is sold by a mortgagee in exercise of its statutory power of sale. As was held by Okwengu J in **Eric Odindo vs. National Bank of Kenya Ltd & 2 others Nairobi HCCC No.445 of 2007 (Milimani)** (unreported) at page 16 of her ruling:

*“The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of power of sale by the chargee, non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction sale (**Civil Application No. NBI 165 of 2005 Ngayo Traders Limited vs. Savings & Loan (K) Ltd.**”*

In the present application, it is clear that no statutory notice as envisaged under **Section 69A(1)** of the **Transfer of Property Act** was served upon the plaintiff by the defendant before the defendant gave instructions to Palomino Auctioneers to advertise and sell by public auction the mortgaged properties pursuant to the instruments of mortgage executed by the plaintiff.

Although the defendant referred to a letter written by Hardware Corner Limited dated 7th March, 2003 and which was annexed as the last exhibit in the replying affidavit of Henry Maina, and which purportedly confirmed that the firm of Mohamed & Mungai Advocates had issued a three months statutory notice on behalf of the defendant, the defendant failed to exhibit a copy of the said statutory notice purportedly issued to the plaintiff. There is no evidence before court to suggest that such notice was served upon the plaintiff. The plaintiff has therefore established a prima facie case to enable this court grant it the interlocutory injunction sought. It would be unnecessary for this court to consider the other principles set out in **Giella vs Cassman Brown** in view of this court's finding that the plaintiff has established a prima facie case.

The plaintiff's application dated 28th July, 2006 is hereby allowed. The defendant by itself, its servants and/or agents are hereby restrained by means of an interlocutory injunction from advertising for sale by public auction or private treaty or howsoever at any time alienating or dealing with or interfering with the ownership or quiet possession and enjoyment by the plaintiff of the suit properties known as **LR Nos.2951/322, 2951/350, 2951/356 and 2951/357** pending the hearing and determination of the suit. The plaintiff shall have the costs of this application.

DATED at NAIROBI this 21st day of MAY, 2008.

L. KIMARU

JUDGE