



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT 169 OF 1998

AMOS KIUNGA R. MUTUNGI PLAINTIFF

VERSUS

HOUSING FINANCE CO. (K) LTD DEFENDANT

RULING

The application before me seeks four (4) substantive orders as follows:-

- (i) leave to join Stephen Michuki M'Kiunga, the purchaser of L.R. NYAKI/THUURA/718 (the suit property) in the proceedings.
- (ii) restraining the said Stephen Michuki M'Kiunga from accessing, entering and/or in anyway interfering with the plaintiff's user and occupation of the suit property
- (iii) annulment, cancellation and/or setting aside the purported sale by public auction of the suit property by View Line Auctioneers
- (iv) citing of M/S View Line Auctioneers for contempt of the court orders issued on 5th September 2007

Before I consider the application it is important to provide a brief background to this matter. The present applicant brought the instant suit against the respondent for an order of injunction to restrain the latter from advertising and sale of the suit property until accounts have been taken between the parties.

The suit arose out of a loan in the sum of Kshs. 950,000/= advanced by the respondent to the applicant secured by a legal charge dated 19th December 1994 in respect of the suit property. It is the applicant's case that although the loan facility agreed upon was Kshs. 950,000/= the respondent in breach of the charge only disbursed Kshs. 900,000/=. The respondent also failed to specify the time when the instalments would be due and when the respondent would elect not to make any advances to the applicant. The applicant also complains of the method of calculating the interest rates which had the effect of escalating it beyond the agreed 29%.

Being apprehensive that the suit property may be sold by the respondent in the exercise of its statutory power of sale, the appellant brought this suit on 22nd December 1998 simultaneously, as is the practice, with chamber summons for a temporary injunction.

The respondent filed a defence on 29th January 1999 in which it denied the allegations contained in the plaint and asserted that in fact the applicant has consistently been in default. Apart from the chamber

summons of 21st December 1998, the applicant has brought three applications seeking restraining orders. The second application is dated 25th October, 2000, the third one is dated 31st August 2007 and the present application. The first two applications were withdrawn while the third application was stood over general.

In the instant application the second prayer seeking to join Stephen Michuki M’Kiunga, which prayer was allowed by consent. That leaves prayers 3, 4 and 5. Prayer 3 seeks orders to restrain Stephen Michuki M’Kiunga from:-

“accessing, entering and/or in anyway interfering with the plaintiff’s user and occupation of L.R. Nyaki/Thuura/718.”

Learned counsel in his submissions in this application stated-

“The applicant was running a school on the suit property which was his only source of livelihood. The 2nd defendant has taken possession of the property and is running the school. He is now registered as the proprietor.”

I do not see how I can issue an order of injunction to restrain the 3rd respondent in terms of the prayers set out above in view of the fact that the applicant has been dispossessed and the 3rd respondent is in possession. The effect of such an order would amount to an order of mandatory injunction which can only issue in clear and uncontroverted cases. This is not one such a case.

Secondly, the relief sought being an injunction, the conditions for the granting of the same must be satisfied. Has the applicant demonstrated a *prima facie* case with a probability of success at the trial; is he likely to suffer such irreparable injury or loss which is incapable of being adequately compensated in damages; is the balance of convenience in his favour? See **Giella V. Cassman Brown & Co. Ltd** (1973) EA 358.

I have already observed that ownership has changed hands following a public auction which this suit intends to stop. Secondly, the applicant has not rebutted the respondent’s averment in the statement of defence and subsequent affidavits in reply to the various applications filed by the applicant that the loan repayment has fallen in arrears. What the applicant is challenging in this suit is interest and the balance due.

Indeed in the main suit he seeks an order of injunction until-

“proper accounts have been taken between the parties.”

The charge in this dispute was created under the Registered Land Act, Cap 300. By section 74(1) of that Act the chargee is entitled to exercise statutory power of sale if the chargor defaults, among other things, in the pay of the principal sum or of any interest. In **Ng’ayo Traders Ltd V. Savings & Loan (K) Ltd** Civil Application No. NAI. 165 of 2005 (unreported) the Court of Appeal stated:-

“Moreover, where there is a dispute as to the amount due under the charge, like in this case, the courts do not normally grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is such a dispute. (Shah V. Devji (1965) EA91). The justification is that, in a case like this one, the chargers statutory remedy for irregular exercise of power of sale is damages only against the chargee (see section 77(3) of RLA).”

Clearly the applicant’s remedy is in the award of damages, if any, against the 1st respondent. The applicant has not claimed that the 1st respondent has no financial means to compensate him. The balance of convenience is also in favour of the 2nd respondent who is already in possession. Although the sale of the suit property to him is alleged to have been done fraudulently, no particulars of fraud in terms of Order 6 Rule 8 of the Civil Procedure Rules have been cited. It is the applicant’s contention that the sale

took place in contravention of the order issued by the court on 3rd September, 2007 restraining the 1st respondent from selling the suit property. The applicant maintains that the 1st respondent, its counsel and the auctioneers were duly served with the order. Yet they proceeded to sell the suit property on 10th September 2007.

The 1st respondent on the other hand relies on three affidavits in reply. The first affidavit is sworn by counsel for the 1st respondent in which he denies that the order was served upon the firm of Mithega & Co. Advocates. That only the application was served. The second affidavit is sworn by Eliphelet Mugambi who describes himself as a clerk in the firm of M/S View Line Auctioneers to the effect that the firm was not served with any restraining order on 6th September, 2007 as claimed by counsel for the applicant.

Finally, it is deposed by Joyce Njoroge, the legal officer of the 1st respondent in the third affidavit that the 1st respondent instructed M/S View Line Auctioneers directly to proceed with the sale. She similarly denies any service of the restraining orders on the 1st respondent. Counsel for the applicant, who served the application and the order on the 1st respondent's advocates has deposed that he served it on Kaluma. There is no indication as to the capacity or even responsibility of Kaluma to accept service. Was Kaluma a recognized agent as provided for under Order 3 Rule 3 of the Civil Procedure Rules? Was he/she authorized under Order 5 rule 3? Order 5 Rule 9(2) is clear that service of any process may be effected upon an advocate who has instructions to accept service. It is not disclosed whether the said Kaluma is an advocate in the firm of Mithega & Co. Advocates.

It is instructive to note that by dint of Order 47 Rule 2 of the Civil Procedure Rules all orders under the Civil Procedure Rules are to be served in the same manner as provided for the service of summons.

Was M/S View Line Auctioneers served? According to an affidavit of service sworn by Joseph Mburu Kungu on 10th September 2007, the process server served upon Mr. Mugambi of View Line Auctioneers the order in question on 10th September 2007 but Mr. Mugambi refused to sign to acknowledge receipt.

There is yet an affidavit by counsel for the applicant sworn on 21st January 2008 to the effect that he personally served the orders upon a secretary for M/S View Line Auctioneers. The details of the secretary is not disclosed.

In response there are three affidavits. The first one is sworn by the legal officer of the respondent to the effect that the respondent was not served with the order in question yet it is the respondent that had directly instructed View Line Auctioneers. The second affidavit by Eliphelet Mugambi is to the effect that counsel for the applicant did not serve him as alleged or at all.

That he was in Nairobi on 16th September 2007 when he was allegedly served. He further deposes that he is not authorized to conduct a sale by auction and confirms that the sale on 10th September 2007 was conducted by Gitonga Ringera.

Finally counsel for the respondent has deposed in his affidavit that their firm was served only with the copy of the application and not the order. These averments, namely that the respondent, View Line Auctioneers and the respondents' advocates were not properly served, have not been challenged. It has not been shown that indeed Mugambi conducted the auction after being served with the order. His assertion that he is not qualified to conduct an auction and that in fact it was a Mr. Gitonga Ringera who conducted the auction on that day, as well as his evidence that on the day of the auction he was in Nairobi have all not been rebutted.

I come to the conclusion on this point that the service, if at all, was not properly effected.

Contempt of court proceedings are *quasi – criminal* in nature. For one to be cited for contempt it must be shown that one was aware of the existence of the order one is alleged to have breached. Without

evidence that View Line Auctioneers was properly served they cannot be so cited for contravening the order.

Secondly, View Line Auctioneers is not such an entity that can be punished for contempt as it is not a limited company. Finally, and more fundamentally, the procedure for commencing contempt proceedings have not been complied with.

For the foregoing reasons this application fails and is hereby dismissed with costs to the two respondents.

Dated and delivered at Meru this 12th day of May.... 2008.

W. OUKO

JUDGE