



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

Civil Case 500 of 2005

CLEMENT THUKU IKIGU PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED DEFENDANT

RULING

(1) In his Notice of Motion filed on the 13th March 2007, the Plaintiff has sought two main orders:

- “1) THAT, the Injunctive Orders made on 25th November 2005 be discharged and set aside.**
- 2) THAT, in the alternative the Order of Injunction be varied to be conditional on Plaintiff depositing the sum of Kshs.22,028,940.40 still owing and outstanding on the Borrowers account as at 1st December 2006.”**

(2) The Plaintiff instituted this suit on the 9th September 2005 against Housing Finance Company of Kenya Limited (“**HFCK**”) seeking, among other orders, to restrain HFCK from selling his properties namely Plots Title Nos. NAIROBI/BLOCK 116/1294 and 1295 which the Plaintiff charged to HFCK to secure repayment of the sum of Kshs.10,500,000/= advanced by HFCK to Hardy Supermarket Ltd. (“**the Borrower**”). The Plaintiff has since been amended twice – on the 6th October 2005 and again on the 22nd February 2007.

(3) Simultaneous with the filing of the Plaintiff, the Plaintiff applied for a temporary injunction to restrain HFCK from exercising its statutory power of sale. That application was heard by Azangalala, J who allowed it on the 25th November 2005. In the course of his ruling, the learned Judge observed that:

“The Defendant has not exhibited any demand made against the Plaintiff. A demand was however made against the borrower Hardy Supermarket Limited. But was it served? The Statutory Notice dated 1.12.2004 was addressed to the borrower at P.O. Box 10420. This is not the borrower’s address given in the charge. The Defendant has not explained how the said address was obtained. The explanation that the borrower uses different addresses was with respect not sufficient or reasonable. On the material availed to the Court, I find that the Defendant did not serve a demand for payment against the borrower or the chargor. In the premises I find that the Defendant’s statutory power of sale had not arisen and therefore the notification and advertisement of the suit properties was not proper.”

(4) HFCK did not appeal against that ruling. Instead, it now asks the court in the application before me to discharge and set aside the order of injunction made by Azangalala, J.

HFCK relies on two affidavits both sworn by Joseph Kania, an Advocate and the Legal Services Manager at HFCK, respectively dated the 13th March 2007 and 18th May 2007. He says that subsequent to the order of court made on the 25th November 2005, HFCK has put its house in order by serving the Plaintiff as well as the Borrower with a fresh and valid Statutory Notice dated the 21st August 2006 by way of registered post. The Defendant further contends that since the Plaintiff and the Borrower have failed to pay the outstanding amount due to HFCK and continue in default, the Plaintiff is no longer entitled to benefit from the injunction orders.

(5) The Plaintiff opposes the application on the basis of his affidavit sworn on the 10th May 2007. In paragraph 4 thereof, he states that he has not been served with a statutory notice and or a demand for payment of any alleged outstanding monies.

(6) The statutory Notice upon which HFCK relies was posted to the Plaintiff and the Borrower at Post Office Box No.15691 Nairobi. In the Charge dated the 17th February 1998 and registered on the 3rd March 1998, the postal address of both the Plaintiff and the Borrower is stated to be at Box No.39425 Nairobi. Joseph Kania, at paragraph 4 of his supplementary affidavit dated the 18th May 2007 says that the notice was sent to the last known address of the Plaintiff and the Borrower, namely P.O. Box No.15691 Nairobi, and produces copies of two letters on the Borrower's letterhead together with a copy of a loan re-scheduling application form as confirmation of such address. Both such letters are addressed to HFCK and signed by

“ENG. THUKU IKIGU

DIRECTOR

HARDY SUPERMARKET”

and the Postal address at Box No.15691 stated in the loan re-scheduling application form is clearly that of the Borrower. I have also noted from the correspondence annexed to the Plaintiff's supplementary affidavit sworn on the 6th October 2005 that he has given his postal address as Box No.10420 Nairobi.

(7) Clause 18 of the said Charge dated the 17th February 1998 provides that any written demand or other notice made or given by HFCK to the Plaintiff or the Borrower for any of the purposes of the Charge or the Registered Land Act [Cap.300] shall be deemed to have been received by the Plaintiff or the Borrower on the date on which it is served on the Plaintiff or the Borrower personally or left at the Plaintiff's or the Borrower's last known place of residence or business or sent by registered post to the Plaintiff or the Borrower at their last known address in Kenya or served on the Plaintiff's attorney, agent or servant or on any adult member of his family or displayed on the charged property as provided by section 153 of the said Act.

(8) From the material before me, HFCK has explained to my satisfaction the reason for posting the Notice to the Borrower at P.O. Box 15691 Nairobi and not to the postal address stated in the Charge. However, the Defendant has given no explanation as to why it did not dispatch the Notice to the Plaintiff at the address given in the Charge or to P.O. Box 10420 Nairobi.

Given the finding of Azangalala, J that no notice had been given to the Plaintiff, one would have expected HFCK to have ensured that any “fresh notice” was properly served in accordance with the terms of the Charge, if necessary by sending such notice to all postal addresses of the Plaintiff known to the Defendant. HFCK was also at liberty to use the other modes of service provided in the Charge.

(9) In these circumstances, I am left in some doubt that the Notice dated the 21st August 2006 was ever served and received by the Plaintiff and since the burden of service lies with HFCK, I am inclined to

give the Plaintiff the benefit of doubt.

In the result, the Notice of Motion filed on the 13th March 2007 fails and it is hereby dismissed.

(10) Costs, ordinarily, follow the event. In this case, however, it is just conceivable that the Notice sent to the Plaintiff at the postal address of the Borrower (of whom he is a Director), may have been duly received by him. For that reason, I will make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this Thirteenth day of June 2008.

P. Kihara Kariuki

Judge