



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 556 of 2008

MARGARET WANGUI GACHARA..... PLAINTIFF

VERSUS

BANK OF INDIA LIMITED.....DEFENDANT

R U L I N G

The application is the Chamber Summons dated 24th September, 2008 brought under Order XXXIX rules 1 and 2 of the civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks one main prayer.

3. THAT the defendant by itself, its servants, agents or auctioneers or any of them be restrained by injunction from selling by **Public Auction or Private Treaty or otherwise howsoever or alienating or in any way parting with possession of the property comprised in Land Parcel No. NAIROBI/BLOCK 99/34 pending the hearing and determination of the suit herein.**

The application is based on the following grounds as cited on the face of the application.

1. **THAT the defendant has unlawfully advertised for sale by way of public auction the suit property herein on the 26th September, 2008.**
2. **THAT the plaintiff was not served with a statutory notice as required and which notice is a prerequisite before any sale can take place.**
3. **THAT the plaintiff was not served with a notification of sale as required or at all.**
4. **THAT the notices serviced by the defendant herein are fatally defective and cannot form the basis of the sale scheduled on the 26th September, 2008.**
5. **THAT the plaintiff has a prima facie case against the defendant.**
6. **THE defendant's right of sale has not arisen.**
7. **THAT the suit property is residence of the plaintiff together with her family and if it is sold she will be rendered destitute.**

The application is supported by the affidavit of the Plaintiff, Margaret Wangui Gachara, dated 24th September, 2008. In that affidavit, the Plaintiff avers that she is the registered owner of the property L.R. No. NAIROBI/BLOCK 99/34 (herein after referred to as the suit property). The Plaintiff avers that she charged her property in favour of the Defendant Bank to guarantee a loan to a company called BACTLAB SYSTEMS (EA) LIMITED. She avers further that the loanee is a going concern which is still running its business. The Plaintiff deposes that in June 2008, she received a letter dated 7th May, 2008 from the Defendant demanding Kshs.8,575,605/05, being the amount of the loan outstanding as at 1st April, 2008. Her contention was that the notice was invalid as it was not addressed to her but to one Margaret Wambui Gachara. The Plaintiff contends that in July 2008, she received two letters from Dalali Traders Auctioneers, the Defendant's agent, both addressed to Margaret Wambui Gachara, notifying her of instructions to sell the suit property if

the sum owed is not paid. The Plaintiff deposes that both notices were invalid as they did not give her 45 days redemption notice as required under the Auctioneers Act.

The application is opposed. The Defendant has filed a replying affidavit sworn by RAJA KISHORE LENKA, the Defendant's Chief Manager, dated 29th September, 2008. In that affidavit Mr. Lenka deposes that a demand was sent to all four partners of BACTLAB SYSTEMS (EA) LIMITED and to the company itself as guarantors and principle debtor, respectively, to regularize the overdraft facility or face the institution of legal process to recover the entire outstanding amount. The demand letters are annexed. Mr. Lenka denied that the overdraft facility was frozen or that the partners of BACTLAB, without the knowledge of the Plaintiff, were allowed to open a new account as deposed by the Plaintiff in her supporting affidavit. Mr. Lenka deposes further that the relationship between the Plaintiff and Defendant was contractual and that the suit property was traded in as security for the loan and was therefore a commercial property. Mr. Lenka contended that the Defendant should not be stopped from realizing its security on grounds that the Plaintiff was being to pay the loan advanced to the principal debtor.

I have considered the application, together with the affidavits sworn by both parties and submissions by counsels to the parties. The case the Plaintiff has to prove at the trial is that she was not served with a valid statutory notice under section 74 of the Registered Land Act and a valid 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 Defendant and that it was not a default that could be remedied by an award of damages. The principles in **Giella vs. Cassman Brown & Co. Limited [1973] EA** apply to this case. The Plaintiff has to show that she has a prima facie case with a probability of success at the trial.

The Plaintiff's contention is that she received a notice dated 7th May, 2008 on the 17th June, 2008. The Plaintiff contends that the names in the notice, though discussing the suit property, were those of MARGARET WAMBUI GACHARA, while her middle name was WANGUI. By reason of the difference in the middle name, the Plaintiff contends that the notice was invalid. The Plaintiff contended that the notice was served pursuant to Section 69 of the Transfer of Property Act, while the suit property was registered under the Registered Land Act. The Plaintiff contends that for these reasons the notice was invalid. The Plaintiff's case is that the notice did not give her the mandatory 3 months notice period since, on 23rd July, 2008, less than 1½ months later, she was served with the 45 days Redemption Notice and a Notification of Sale by the Auctioneers. The Notice, she averred, was to two persons. One of those was to a person whose names were similar to those in the Statutory Notice, which the Plaintiff contends are not her names. It gave notice that the suit property would be sold on 24th September, 2008, which is two days earlier than the one advertised in the local dailies.

Mr. Havi for the Defendant was of the view that the only thing the Plaintiff was clinging on in support of the application was the misnomer in the spelling of her name. Mr. Havi submitted that if section 69 of Transfer of Property Act was to be removed from the notice, it could still be effective as a statutory notice of sale as the Plaintiff got the full benefit of the 3 months she required.

I have carefully considered the statutory notice served on the Plaintiff. The letter gives the notice as follows:

“TAKE NOTICE therefore, that pursuant to section 69 of the Transfer of Property Act 1882, our clients will exercise their statutory power of sale of the above properties charged to them, if after THREE (3) MONTHS from the date of receipt of this letter by yourself, the said sum of Kshs.8,575,605:05 together with interest as aforesaid is not paid to our clients in full.”

The Plaintiff was entitled to 3 months under Section 74 of the Registered Land Act. The Plaintiff's complaint that the notice was not meant for her as her middle name was misspelt is untenable. The notice was sent to her address and she acknowledges receiving it. The misspelling of her name is in my view immaterial and caused no prejudice to the Plaintiff since the rest of the information was correct and since no objection was raised to the use of the name upon receipt of the notice. If indeed the Plaintiff was sincere regarding the name and she felt strongly about it, she ought to have brought it to the attention of the Defendant sooner. I do not consider the misnomer in the middle name of any material significance. The fact also that the notice invoked section 69 of the Transfer of Property Act, instead of Section 74 of the Registered Land Act, which was the relevant law, does not in my view invalidate the notice. There was nothing wrong with the notice on the face of it.

Regarding the notice been received one and a half months after the date it was sent and whether sufficient notice was given. I am aware that the notice gave “three months” notice from the date of receipt of the notice”

Section 74 of Registered Land Act which applies provides thus:

“74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any

part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.

(2) if the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may –

(a) appoint a receiver of the income of the charged property or

(b) sell the charged property;

The other issue was in regard to the notification of sale. Under rule 15 (d) of the Auctioneers Rules, the Auctioneer must:

“15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property –

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.”

Section 74 of the RLA provides that the three months have to be computed from the date of receipt of the notice. The Plaintiff claims that the date of receipt was one and a half months after the date of the notice which I think is unreasonably long. Under section 3(5) of the Interpretation and General Provisions Act provides that service will be considered to have been effected from the date the ordinary mail would be delivered in the ordinary course of the post. The Defendant did not address this point nor has it annexed the certificate of posting. However that period has been considered to be three days and therefore in my view I do consider that one and a half months is unreasonably a long time for an ordinary mail to be delivered in the ordinary course of posting. In conclusion therefore I do consider that for the purpose of service the Plaintiff received the statutory notice three days after the date of the notice, which is 7th May, 2008. For that reason the three months notice expired on the 10th of August, 2008.

It is clear the notification of sale was sent to the Applicant on 23rd July, 2008 and that it gave notice of sale as 24th September, 2008. The three months statutory notice was to end on the 10th August, 2008. To be valid the notice had to give the Plaintiff 45 days of notice. Computed from 8th August, 2008 in order to give the Plaintiff the requisite period required under the Auctioneers Rules. A simple computation of the days between the last day after the expiry of the statutory notice and the 24th September, 2008, when the suit property was to be sold, reveals that the Plaintiff was given 40 days to redeem her property. The Notification of Sale served upon the Plaintiff, and which she acknowledged, was therefore invalid. That does on its own does not entitle the Plaintiff to an injunction to stop the Defendant from exercising its statutory power of sale especially where that power has crystallized and the statutory notice served. The defect can easily be remedied by issuance of a proper notification of sale and Redemption notice, which the Defendant should do if it wants to proceed with the sale.

The Applicant has argued that the Defendant was purporting to sell the suit property without a valuation on the property within 12 months of the date of the sale in accordance with rule 15(e) of the Auctioneers Rules. For that proposition the Plaintiff relies on the case of **Joseph Kariuki vs. Equity Bank (Milimani) HCCC 85 of 2008**. I have considered that authority. The reason an injunction was granted in that case was based on the court's finding that no statutory notice was served contrary to the provisions of section 74 of the Registered Land Act and that *prima facie*, that finding entitled the Applicant in that case to an order of injunction. In the instant case, I have found as a fact that the Plaintiff was served with the requisite statutory notice as required under section 74 of Registered Land Act and also with the notification of sale as required under rule 15 of the Auctioneers rules.

A valuation of the property before sale is a requirement contained in the subsidiary legislation and not in substantive law under the Auctioneers Act. Following the principles of interpretation, a substantive law takes precedence over subsidiary legislation. It is my view that rule 15(e) of the Auctioneers Rules cannot oust the provisions of section 74 of Registered Land Act, to require that a valuation of within 12 months of the date of sale is a prerequisite to the crystallization of a Chargee's statutory power of sale.

In conclusion, after carefully considering this application, I have come to the conclusion that the Plaintiff has not established a *prima facie* case to warrant a grant of the injunctive relief sought in this application. Having been served with all the requisite statutory notice, and the Plaintiff having admitted that the debt is still owed, I am satisfied that the Defendant's statutory power of sale had crystallized and that it cannot be stopped from exercising its right. The Plaintiff is undeserving of the orders sought. For this reason, I dismiss the Plaintiff's application in its entirety with costs to the Defendant.

Dated at Nairobi this 24th day of October 2008.

LESIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Havi for the Plaintiff

Mr. Wainaina for the Defendant

LESIT, J.

JUDGE