



REPUBLIC OF KENYA

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

Civil Suit 427 of 2008

JOSEPHINE NJOKI MWANGI (Suing As the legal/personal representative

of the estate of the late Joseph Kiragu Muraguri.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE CORPORATION OF KENYA LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

This is an application brought by the Plaintiff under Order XXXIX rules 1 and 2 of the Civil Procedure Rules. It seeks to have an interlocutory injunction to restrain the Defendant from selling, transferring, alienating or otherwise interfering with the Plaintiff's possession of L.R. No. Nairobi/Block 111/16 Komarock Estate. The grounds on which the application is based are on the face of the application. There is a supporting affidavit sworn by the Plaintiff and a supplementary affidavit also sworn by the Plaintiff.

The application is opposed. There is filed a replying affidavit sworn by June Njoroge the Assistant Manager, Legal Services, in the Defendant's institution dated 4th September, 2008. It is the plaintiff's case that she is the administratrix of the estate of Joseph Kiragu Muraguri who charged the suit property to the Respondent to secure a mortgage obtained from the Defendant institution in 1990. The Plaintiff's case is that on the 29th May, 2008 she received a notification of sale from Nguru Enterprises indicating that the suit property was scheduled for sale on 1st August, 2008 and giving her 45 days to redeem the property. The notice was written in the name of the deceased. It was also the Plaintiff's case that on 16th May, 2005 despite knowledge that the deceased had passed on, the Plaintiff purported to serve a statutory notice on, the deceased demanding payment of Kshs.5,824,771/=.

Mr. Kenyatta for the Plaintiff submitted that the notice served was defective because the chargee was aware that the chargor was deceased yet the chargee sent the notice to the chargor. Counsel argued that in the circumstances the Defendant who is the chargee cannot exercise its statutory power of sale. The Defendants have annexed a statutory notice dated 2nd June, 2005 and addressed to the estate of the deceased which they claim was served upon the Plaintiff. The Plaintiff in the supplementary affidavit has denied receiving that notice.

I have looked at the said notice. It is a statutory notice and meets the requirement of the law. It was not addressed to the Plaintiff but was addressed to the 'estate' of the deceased. It is indicated on the letter that it was a registered mail. Since the receipt of that notice was denied, it was incumbent upon the Defendant to prove service. The easiest way to prove this was to annex a certificate of posting as proof

that the letter had been sent by registered mail. No such certificate was annexed. On a prima facie basis, I find that the service of that notice has not been established. That therefore means that the only notice that is proved to have been served was the one addressed to the deceased person after his death. The intended sale was therefore based upon the notification of sale served on the deceased person.

The service of a Statutory Notice of Sale of suit property upon a deceased person is invalid. The Chargee cannot exercise its statutory power of sale based on such a notice. The Defendant's statutory power of sale can not crystallize upon such service. The Defendant could therefore not exercise that power to sell the suit property.

The Plaintiff has in this application raised several other issues. I do not think that it is necessary to go into those other issues, having found that no valid statutory notice of the intended exercise of statutory power of sale was served upon the Plaintiff as the Administratrix of the Estate of the deceased. I find no merit in the Plaintiff's application.

The application dated 31st July, 2008 is allowed in the following terms:

1. That an interlocutory injunction be and is hereby issued to restrain the Defendant either by itself, its agents and/or servants from selling, transferring, alienating or otherwise howsoever interfering with the Plaintiff's possession of L.R. No. Naiorbi/Block 111/16 Komarock Nairobi pending the hearing and determination of the suit.

2. The Plaintiff will have the cost of this application

Dated at Nairobi this 21st day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Kamende holding brief for Mr. Kenyatta for the Plaintiff

Mr. Mungai for Defendant

LESIIT, J.

JUDGE