



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 61 of 2007

SAMSON KIAMA MACHARIA.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

RULING

By a plaint filed on 7.2.2007 the plaintiff prayed for a permanent injunction restraining the defendant, its agents, servants, auctioneers or any person claiming through them from transferring alienating, selling, charging and/or dealing in any manner whatsoever with L.R. No.13324/61 Akiba South C Estate Nairobi (hereinafter called “the suit property”) pending the hearing and determination of the suit. In the body of the plaint, it was averred that the suit property was used as a security for a loan overdraft facility in favour of an entity called Saki Holdings Limited (hereinafter called “the borrower”). It is also averred that in or about January 2005, the plaintiff and the defendant agreed that the plaintiff would pay KShs.80,000.00 per month towards liquidation of the loan account. It is then pleaded that pursuant to the said agreement, the plaintiff endeavoured to make the payments until July 2006 when as a result of being taken ill and the filing of numerous cases against the borrower the plaintiff was unable to continue making the agreed payments. It was further pleaded that the plaintiff attempted to renegotiate the repayments with the defendant without success. It was also averred that the plaintiff never received any demand notice and/or notification of sale from the defendant. Yet on 5.2.2007 the defendant through Garam Investments Auctioneers advertised the suit property for sale on 20.2.2007. It was further averred that the intended sale was premature and thus null and void as no notification of sale had ever been served upon the plaintiff as required under the law.

Simultaneously with the plaint, the plaintiff filed an interlocutory application by way of chamber summons seeking an interim prohibitory injunction to restrain the defendant from selling, charging, alienating, transferring and/or dealing in any manner whatsoever with the suit property pending the hearing and determination of the suit. The application is based on the principal grounds that: there was no formal demand notice that was ever given to the plaintiff or at all prior to advertising the suit property; that the plaintiff stands to suffer irreparable loss and damage if the property is sold; that the plaintiff’s failure to service the Loan account was brought about by matters beyond his control; that the plaintiff was offering to service the loan account by making monthly payments of KShs.80,000.00 till payment in full, that the property serves as the matrimonial home and the disposal of the same would be detrimental not only to the plaintiff but to his entire family; that the defendant has never rendered any accounts to the plaintiff in respect of the actual sums outstanding on the loan account and that the sale was premature and done in bad faith.

The application was supported by the plaintiff's affidavit which essentially endeavoured to substantiate the above grounds. He also swore a supplementary affidavit in which he essentially reiterated the averments in the supporting affidavit ending that since the commencement of the suit he had paid KShs.160,000.00 to the defendant and was ready and willing to redeem his property.

The application was opposed and there is a replying affidavit sworn by one Regina K. Anyika the defendant's Senior Legal Officer. In the said affidavit it was deponed that the plaintiff had admitted his indebtedness to the defendant and that the plaintiff was served not only with a formal demand notice but also a proper notification of sale. It was also deponed that any damage that the plaintiff would suffer if the injunction was refused would be compensated by the defendant which is a highly reputable financial institution.

The application was canvassed before me on 3.5.2007 by Mr. Mugire Learned counsel for the plaintiff and Ogutu Ms Learned counsel for the defendant. The plaintiff's primary argument was that no statutory notice of sale was served as required under Section 69/A of the Indian Transfer of Property Act and therefore the defendant's statutory power of sale had not arisen. Reliance was placed on the case of **Trackspa Limited – vs – Industrial and Commercial Development Corporation: HCCC No.21 of 2001 (UR)** for the proposition that without service of the statutory notice the defendant's statutory power of sale had not arisen. For the same proposition reliance was placed upon the case of **Komassai Plantations Limited – vs – Bank of Baroda Kenya Limited [2003] 2 EA 535.**

For the defendant it was argued that as the plaintiff had admitted his default he was not entitled to the equitable relief of injunction. In counsels' view, the plaintiff was served with a demand notice and the notice of intention to sell the suit property and no case had been made for the grant of the orders sought.

I have now considered the application, the affidavits filed and the submissions made to me by counsels appearing. Having done so, I take the following view of the matter. It appears to me that the survival of this application depends largely on whether or not the plaintiff was served with the statutory notice required by Law. In deciding that issue I remind myself that I am not required to make definitive findings of fact or of law at this interlocutory stage. The defendant exhibited 5 documents to the replying affidavit sworn by its Senior Legal Officer aforesaid Annexure "RKA 1" was a letter from Garam Investments notifying the plaintiff that the auctioneers would sell the suit property after 45 days in default of payment of KShs.1,769,175/=. "R.K.A.2" was a list of Registered Postal Packets. "RKA 3" was a Notification of Sale issued by the said auctioneers. "RKA 4" was a certificate under Section 15(c) of the Auctioneers Rules 1997 and "RKA 5" was a letter to the defendant from the same auctioneers. None of those documents can be described as a statutory notice of sale. The defendant did not therefore demonstrate that it served the plaintiff with any statutory notice of sale at all.

The suit property is registered under the R.T.A. The substantive Law applicable is therefore the Transfer of Property Act 1882 of India (hereinafter called "the Act"). Under that Act a mortgagee's statutory power of sale arises where the mortgage money has become due and that event happens.

"Whenever either the day fixed for repayment thereof or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage money or part thereof, immediately due and payable". (Section 69 (1) of the Act).

However by dint of the provisions of Section 69(A) 1(a) of the Act the power of sale cannot be exercised unless and until:

"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 part thereof, for three months after such service."

It is clear from the above section of the Act that a valid statutory notice must give the mortgagor a period of 3 months from the date of service to redeem the charged property. As Gicheru, J.A (as he then

was) said in **Trust Bank Limited – vs – George Ongaya Okoth: CA No.177 of 1998 (UR):**

“the object of a statutory notice under Section 69 A 1(a) of the Act is to protect the rights of the mortgagor and that notice would be ineffective if it is not in conformity with the aforementioned subsection the results whereof being that the exercise of the mortgagee’s power of sale would not have accrued.”

The Court of Appeal was categorical that if the exercise of the power of sale has not accrued any sale of the mortgage property would be illegal. In other words, a statutory power of sale is only exercisable after a valid notice has been served upon the mortgagor in the manner recognized by Law.

In the case at hand, the defendant failed to comply with the above statutory provisions and without compliance the defendant cannot validly exercise its statutory power of sale. It is irrelevant that the defendant is capable of paying whatever damages the plaintiff may be awarded should the injunction be declined. Taking that view of the matter, I am satisfied that the plaintiff has shown a **prima facie** case with a probability of success at the trial.

The second condition for the grant of an interlocutory injunction set by the case of **Giella – vs – Cassman Brown and Company Limited [1973] E.A. 358** is that the applicant should normally show that unless the injunction is granted, he would suffer an irreparable injury which cannot be compensated in damages. In considering that condition I bear in mind the fact that the suit property is a matrimonial home of the applicant to which he no doubt attaches great sentimental value. To the applicant therefore the injury to be suffered if the injunction is not granted would be irreparable. That may not make commercial sense since the applicant himself converted the property into a commodity for sale whose loss can be compensated in damages by offering the property as security to the defendant. However a plain reading of the second condition for the grant of an interlocutory injunction does not mean that an interlocutory injunction can never issue where damages would be an adequate remedy and the respondent is in a position to pay them. The relief of an interlocutory injunction is discretionary and the court always retains a discretion in the matter. In this case, the plaintiff has shown that the defendant has threatened to sell the suit property without complying with statutory commands. This is a court of equity and it frowns upon the stand taken by the defendant that because it can pay any damages, its disregard of mandatory statutory provisions should be ignored. Taking into account the sentimental attachment of the plaintiff to the suit property I am inclined to protect his proprietary rights in the property by granting the injunction sought. In the premises the plaintiff’s application dated 7.2.2007 is allowed in terms of prayer 3 thereof. The interlocutory prohibitory injunction is granted on the following terms:-

- 1) The plaintiff should file a written undertaking as to damages within the next 7 days of the making of this order.
- 2) The plaintiff should continue making the monthly repayments of KShs.80,000.00 on the 30th of each month. In the event the installment for April, 2007 has not been paid the same should be paid together with the May installment and thereafter subsequent payments should be made regularly on the 30th of each succeeding month.
- 3) In default of compliance with any or all of the above conditions the injunction to be discharged on application by the defendant subject to a valid statutory notice having been previously served.
- 4) Each party is granted liberty to apply.
- 5) Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mogire for the applicant.

F. AZANGALALA

JUDGE

30/5/07