



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 81 of 2007

EXECUTIVE CURTAINS AND FURNISHINGS LIMITED.....PLAINTIFF
VERSUS
FAMILY FINANCE BUILDING SOCIETYDEFENDANT

RULING

This is an application for an interlocutory injunction and is the Chamber Summons dated 12th February, 2007 expressed under Section 3A, and 63 (e) of the Civil Procedure Act and Order 39 rules 2, 3, 5 and 9 of the Civil Procedure Rules. It is seeking that an injunction be issued to restrain the defendant by itself, its servants, agents, employees or any other party acting under its instructions from selling or in any other way dealing in land title number **DAGORETTI/RIRUTA/S.499** pending the hearing and determination of this suit.

There are five grounds to the application and these are:

- (1) Land title number Dagoretti/Riruta/S499 has been advertised for sale on 15th February, 2007.**
- (2) The power of sale had not arisen.**
- (3) Since issuance of the statutory notice on 24th February, 2006 the defendant has accepted almost 25% of the outstanding balance on account of the plaintiff's payment proposal made after the statutory notice was issued.**
- (4) None of the two amounts paid to the defendant by the plaintiff were received without prejudice to the said notice.**
- (5) The defendant is estopped from realizing the security on account of the said notice in view of the payments made and as such the notice is compromised.**

There is also a supporting affidavit sworn by **Mr. John M. N. Mututho** a director of the plaintiff company, who confirms that the plaintiff secured a sum of Kshs. 5 million from the defendant and as a result the suit property charged to the defendant as a security for the repayment of the loan advanced. He states that as at 27th February, 2006 the loan account had an outstanding sum of Kshs.5,595,005/10 and as

a result the defendant issued a statutory notice pursuant to the provisions of section 74 of the Registered Lands Act. He annexed a copy of the said statutory notice received by the plaintiff company.

The deponent avers that upon receipt of the statutory notice the plaintiff approached the bank with a proposal to pay a sum of Kshs, one million immediately and a monthly installment of Kshs.400,000/= per month for one year. The plaintiff also requested the position be reviewed after one year depending on its business performance. It appears the plaintiff paid a further sum of Kshs.400,000/= but subsequently refused to accept other payment. The defendant's statutory notice earlier issued was then followed with an advertisement of sale.

The deponent of the supporting affidavit says that he was surprised to learn that the charged property was being sold by way of public auction, as they relied on the believe that the defendant had accepted the proposal made by the plaintiff.

Mr. Mwangi learned counsel for the plaintiff/applicant submitted that the statutory power of sale does not arise as the defendant is estopped by their own act from selling the suit property. He contended that the bank having accepted the sum of Kshs.1,400,000/= could not unilaterally proceed to advertise the suit property for sale. It was also the submission of **Mr. Mwangi** Advocate that the statutory notice had expired on account of the defendant's own act of accepting the receipt of Kshs.1,400,000/= after the statutory notice was issued.

The respondent opposed the application and filed a replying affidavit through **Mr. Harun Njuguna** who stated that the plaintiff was granted a loan of Kshs.5 million and as the security for the loan the plaintiff charged **L.R. No.Dagoretti/Riruta/S499**. The loan was to be repaid in month installments of Kshs.173,667/= for a period of 36 months. The loan then fell into arrears culminating in the issuance of a demand notice dated 10th January, 2006 to the plaintiff. The plaintiff then replied with a proposal for repayment of the entire debt within 90 days in a letter dated 6th March, 2006. The plaintiff did not honour the said proposal and not a single penny was paid to the defendant within the 90 days proposed. The defendant then instructed auctioneers to issue 45 days notification of sale. In any case the defendant contends that the plaintiff's payment of Kshs.1,400,000/= made immediately prior to the auction is not sufficient to stop the security realization process.

There is no dispute that the plaintiff is seeking the grant of an injunction, which is an equitable discretionary powers/orders. In this case the statutory notice is properly served and without doubt acknowledged by the plaintiff. The statutory power of sale arises because there is a default in the repayment of the loan advanced for certain period. The statutory notice is dated 24th February, 2006 and it was preceded by a notice dated 10th January, 2006 in which the defendant indicated the outstanding amount in the loan account as Kshs.5,894,676/45. The plaintiff on receipt of the demand notice replied through a letter dated 6th March, 2006 in which it requested to liquidate the debt within 90 days. That is a clear admission that the plaintiff defaulted in the repayment and as a result, the debt accrued due to neglect and/or failure of the plaintiff to adhere to the agreed repayment schedule.

According to the evidence available before me there was no repayment between December, 2004 to November, 2006 save for the payments made on 5th July, 2004 and 30th August, 2005. it is clear that the sum of Kshs.1,400,000/= was made after the statutory notice had been issued and the suit property set down for auction. The statutory notice is dated 24th February, 2006 and the payment of Kshs.1,400,000/= was made in November, 2006. In my view by the time the sum of Kshs.1,400,000/= was paid, the statutory power of sale had arisen and a valid statutory notice issued and acknowledged by the plaintiff.

There was no obligation on the defendant to legally accept the proposal made by the plaintiff in November, 2006. There is no evidence to show that the defendant agreed to any variation to the repayment terms. As was rightly submitted by **Mrs. Gachomba** Advocate there was no change of obligation undertaken by the defendant towards the plaintiff. I agree that the contention on estoppel made by **Mr. Mwangi** is not supported by evidence, thus untenable in law.

According to **Mrs. Gachomba** Advocate the loan was to be repaid fully in July, 2006 and the payment of Kshs.1.4 million made in November, 2006 only reduced the amount outstanding in the loan account. I agree there was no magic in the part repayment made by the defendant in November, 2006. The said sum only reduced the liabilities of the plaintiff but could not have, the effect of defeating and/or postponing the statutory power of sale. There was no legal obligation on the defendant to either postpone or cancel the sale. It was optional depending on the circumstances and whether the proposal was acceptable to the defendant. In this case there is no evidence to show that the defendant accepted the proposal made by the plaintiff. In any case the conduct of the plaintiff shows that it is unreliable and untruthful in its dealings with the defendant.

It is my position that any payment received and/or made by a party in default after the issuance of the statutory notice would not take away the rights of the lender to sell the charged property. The payment is usually made in part satisfaction of the debt, therefore cannot defeat the right to recover the full debt outstanding. By making payment of Kshs.1,400,000/=, the plaintiff was fulfilling its obligation towards the defendant in the repayment of the debt or loan advanced. In any case the applicant was bound to repay the loan in full as per the loan agreement. And there is no way the defendant would refuse to accept any payment made in reducing the loan account.

I think, I have expressed myself well to discount the allegations made by the plaintiff is untenable in law. My view is that the plaintiff's case does not fall within the boundaries of **Giella vs Cassman Brown & co. Limited [1973] E.A 358**. In short the conduct of the plaintiff does not meet the expectation and approval of this court, being a court of equity. I am satisfied that in this case an injunction ought not to issue. It is not true as alleged by the plaintiff that the statutory power of sale had not arisen. To the contrary the power to sell the suit property has arisen and is within the powers of the defendant. I am satisfied that there is a valid statutory notice issued to the plaintiff and graciously acknowledged by them. The fact that the plaintiff made some nominal payment in part satisfaction of the debt cannot defeat, delay and/or postpone the statutory power of sale which has arisen and crystallized.

The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charge property is out of the hands of the borrower. As far back as at 6th March, 2006 the plaintiff was well aware that their property was in danger of being sold as a result of the defendant's exercise of its statutory power of sale which had arisen due to their default of.

That danger could not have been extinguished by the payment made by the plaintiff in November, 2006, which was a minimal amount compared to the outstanding figure in the loan account. That fire which the plaintiff failed to extinguish must be allowed to consume the intended area. I am afraid to point out to the plaintiff that the area includes the suit property. This court cannot extinguish a fire started by the plaintiff through its own misconduct. The fire extinguishers are in the hands of the party telling this court to stop the fire. The court must run away from the fire to enable the party who is responsible to extinguish it. In short the owner of the fire must do all within his powers to stop its spread.

In conclusion, it is my decision that there is no prima facie case put forward by the plaintiff. The circumstances in this case are in favour of the defendant who is able to pay any eventual damages. The plaintiff is in default and the defendant has exercised considerable restraint towards the plaintiff, therefore the balance of convenience is in favour of the defendant.

Having given this matter utmost consideration, I am satisfied that the application for injunction has no merit. It is dismissed with costs to the defendant.

Dated and delivered at Nairobi this 18th day of May, 2007.

M. A. WARSAME

JUDGE