



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 135 of 2006

SALIM WANYONYI MACHIO:.....PLAINTIFF

VERSUS

HOUSING FINANCE CO.OF KENYA.....DEFENDANT

R U L I N G

The plaintiff/applicant charged his plot No. LR.NO.ELDORET MUNICIPALITY/BLOCK14/317 to the respondent in 1998 for a loan of shs.1,600,000/=. The amount was to be repaid by monthly installments of Shs.35,412/=. The applicant started repaying the loan though erratically. He fell in arrears in his payments and in November 2006 the respondent decided to exercise his power of sale under S. 74 of the Registered Land Act (Cap 300). A statutory Notice was allegedly sent to the applicant giving him Notice of three months. Later Legacy Auctioneers served him with Notification of sale. The applicant filed this suit seeking the following:-

- a) A declaration that all the interest, charges levies and penalty imposed upon the defendant contrary to the terms of the charge and the law are not enforceable.
- b) An order that the defendant do recalculate the account with the plaintiff without the unlawful charges.
- c) An injunction restraining the defendant from selling by public Auction or otherwise land parcel **No. LR. ELDORET MUNICIPALITY BLOCK 14/317.**
- d) The defendant be consumed to pay the costs of this suit and the incidentals thereto.

Simultaneously with filing the suit the plaintiff filed this application seeking the court to restrain the defendant by an order of injunction from selling the suit land by Public Auction until suit has been heard and determined.

The applicant swore an affidavit in support of the application. He deponed that he has paid the respondent a total of **Shs.2,196,559.40**. The last payment was on 8th April,2006 of **Shs.130,000/-**. On 13th October,2006 a firm of auctioneers left a Notification of sale with his secretary stating that the respondent had instructed them to sell the suit land. The applicant deponed that he had never been served with Redemption Notice. He was never served with any statutory Notice as required by S.74 of the Registered Land Act.

Further it was deponed and submitted by Mr. Machio who prosecuted the application that the respondent imposed charges and penalties that were not provided for in the charge. He also argued that by the time Notice was issued he had not defaulted and he had paid all the arrears.

Application was opposed. **A.M. MBABU** the defendants Eldoret branch manager swore a lengthy affidavit and retaliated that the applicant was in arrears in repayment of the loan. He deponed that a statutory Notice was sent to the applicant by registered mail to his last known address. Mr. Shivaji submitted that the applicant must have received the statutory Notice. The respondent need only to show that they sent the Notice through post.

As to the provisions of S. 65 (2) R.L.A which Mr. Machio referred to Mr. Shivaji submitted that S.74(1) is not subjective to S.65(2) R.L.A. It provides for periodical payments provision of S.74(1) R.L.A are repeated in the charge. Those provisions holds preference and as such it was not necessary to issue Notice under S.65(2) R.L.A.

I have carefully considered the application and the submission. Though several issues were raised I will at this stage narrow down the main issue to weather A Notice was sent to and received by the application under S.74 (1) of R.L.A. and weather there was a Notice to redeem by the auctioneer. If I were to start with the latter it was not exhibited that the auctioneer served any Notice in writing to the applicant to redeem the property. Infact in the affidavit of **A.M. MBABO** no reference to such notice was ever made. Rule 15 of the Auctioneers Rules (1997) provides:-

“ Upon receipt of a court warrant or letter of instructions the auctioneer shall in the case of immovable property:-

- “a)
- b)
- c)

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”

The provisions of that rule are mandatory. The applicant swore that neither he nor any adult member of his family ever received any such notice to redeem the property from the auctioneer. The only notice he received was notification of sale (annexure “D”) which is undated informing him that the suit property will be sold by public auction on 18th December 2006. There was no Notice to redeem served in writing and a such the auctioneer was in breach of rule 15 (d) of the Rules. To that extent the sale stated for 18th December 2006 was therefore unlawful and the application would succeed on that point.

As to the statutory Notice, Mr. Mbaabu in his affidavit deponed that the Notice was served. He annexed a copy of the said notice and a copy of posting dated 5th November 2004. The notice is dated 4th November 2004. That as Mr. Shivaji submitted is evidence of service as it was sent to the applicants last known address. The applicant has not denied the address was his. However he categorically denied that he received the said notice. The applicant clearly deponed in his supporting affidavit and supplementary affidavit that he never received the said notice. As held in the case of **NYANGILO OCHIENG & ANOTHER VS. FANNUEL B. OCHIENG & OTHERS** Civil Appeal No. 148 of 1995 by the court of appeal the averment should have put the respondent on his guard. Apart from swearing that he did not receive the Notice the applicant had no other way of proving that he did not. However the respondent had the opportunity of calling evidence from the post office to show that indeed the letter contrary the said notice was collected from the post office and by who and when. I am alive to the provisions of S.3(5) of interpretations and General provisions Act (cap 2) that the assumption would be that the document was received after posting. However the applicant has clearly denied receiving the said notice. In the face of such denial the respondent need to do more other than just exhibiting a copy of posting. One cannot rule

out the possibility of the notice not being received. This is an issue to be fully canvassed during the full hearing. Suffice it to say, at this interlocutory stage that the applicant has created doubts as to the receipt of the said notice.

There Is also the other issue of when the Notice was issued. It was sent on 5th November 2004 if the certificate of positing is anything to go by. Notification of sale was issued sometimes in October 2006 almost two years later. Of course by then three months had lapsed. However in the intervening period the applicant has shown that he went on servicing the loan a fact Mr. Mbaabu admitted in his affidavit. On wonders therefore if by the time the respondent instructed the auctioneer to sell the property it was over the arrears which had accrued by 4th November 2004 or there were other arrears which arose after the payments done by the applicant. There is the issue of how long a Notice can remain alive. Should a charger issue a Notice, failure to execute after the expiry of the period shown and purport to use the same notice to sell property even after two years despite receiving payments in between? The affidavit of Mr. Mbaabu did not state whether the payments done in between covered the arrears which were there by 4th November 2004 when the Notice was issued.

There are issues the court feel would be properly addressed during the full hearing. The same applies to the issue weather there should have been a notice issued under S.65 (2) R.L.A. At this stage the court is satisfied that the applicant came within the principles set out for granting an injunction in the case of **Giella vs. Cassumen Brown**. If it is true that he never received the statutory Notice, then it would be unprocedural for the respondent to sell the land.

In the circumstances I allow the application. The respondent is hereby restrained by himself, servants or agents from selling by public auction or otherwise the suit land until this suit is heard and determined.

Costs in the cause.

Dated and Delivered at Eldoret this 10th day of July,2007

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESNCE OF:-

C/C - David

Mr. Machio for applicant

Mr. Mwinamo for Respondent