



REPUBLIC OF KENYA

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

Civil Case 151 of 2007

BEATRICE NYAKAMBI MUNYI.....PLAINTIFF

VERSUS

HOUSING FINANCE.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO

T/A GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

The plaintiff has brought this application by way of Chamber Summons under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and any other enabling provisions of the Law. She seeks the following main order:-

“That pending the determination of this suit an injunction do issue restraining the defendants jointly and severally and their agents and/or servants from selling disposing, alienating and/or interfering with the suit premises known as NAIROBI/BLOCK 111/1390 KOMAROCK SECTOR 1 HOUSE NO.436 NAIROBI”.

The application is based on the following principal grounds:-

- 1) That the sale will be unjustifiable, illegal and contrary to the rules of natural justice in that the plaintiff has paid a lot of money in pursuit to the redemption of the charge and has invested in the suit premises to the tune of KShs.3,000,000.00 and for it to be sold due to the sum of KShs.349,047 is unfair.
- 2) That the plaintiff has in the suit called for rendering of accounts to ascertain the amounts she has paid.
- 3) That the loan stood discharged in 1997 when the joint owner James Munyi Macharia died bearing in mind there existed an insurance policy which covered the loan balance in such eventuality.

The application is supported by an affidavit sworn by the plaintiff which in the main elaborates the above grounds. Of note are the averments that the original loan was KShs.223,260.00 and to date KShs.485,952.05 more than double the original loan has been paid and that the suit property is now valued at about 3,000,000.00. Also of importance is the deposition that in 1997 the plaintiff’s husband died and a Group Insurance Cover ought to have been invoked in order to have the loan fully discharged.

On 18.4.2007, the plaintiff amended her chamber summons with the leave of the court and predicated

her application on 2 additional grounds including the ground that the intended sale is unlawful because the 1st defendant did not give the plaintiff the requisite notice as stipulated in the Terms and Conditions of the charge registered against the suit property.

The application is opposed and there is a replying affidavit sworn by one Joseph Kania the 1st defendant's Manager Legal Services. In the affidavit it is deponed that as at 31.1.2007 the plaintiff was in default in the sum of KShs.349,047.60. With regard to the Group Mortgage protection policy, the 1st defendant swears that only 50% was payable under the scheme and the plaintiff was duly informed of the balance to be paid. In any event according to the 1st defendant, the plaintiff admitted being in default and offering to clear the outstanding balance which she has not. In the premises, the 1st defendant contends that the plaintiff has not satisfied the requirements for the grant of an injunction.

Having considered the application, the affidavit, evidence and the submissions of counsel together with the authorities cited, I take the following view of this matter. The plaintiff in the amended Chamber Summons has denied being served with a statutory notice by the 1st defendant. The 1st defendant has not filed any response subsequent to the filing of the amended chamber summons. I find prima facie that no such notice was served. That being the case on the authority of the decision in **Trust Bank Limited – vs – Okoth [2000] 1 EA** I am impelled to grant an injunction in favour of the plaintiff. In the said case Gicheru J.A. as he then was stated as follows at page 277.

“There can be no gain saying that ... in Law the exercise of the statutory power of sale is predicated on the fulfillment of the relevant statutory conditions precedent as are set out under Section 69 A(1) of the Act ... Short of” ... which “the exercise of the mortgagees statutory power of sale would not have accrued”.....

The Learned Judge of Appeal was considering a matter in which the ITPA was the substantive Law. The same position obtains under Section 74(1) and (2) of the Registered Land Act where the charge as here was created under the Latter Act.

In the premises, I am persuaded that the plaintiff has shown a prima facie case with a probability of success at the trial. The plaintiff has sworn that she is widowed and lives in the suit property with her children. In her circumstances, I am persuaded that damages would not be adequate compensation to the injury that the plaintiff would suffer if the suit property is sold.

Balance of convenience also favours the granting of an injunction. The loan advanced was only KShs.223,260.00. The plaintiff has paid upto KShs.485,952.05 more than double the said loan sum. The security is now valued at about KShs.3,000,000.00. The sum allegedly due is only KShs.349, 047.60 far below the value of the security. Those circumstances tilt the balance of convenience in favour of granting the injunction.

In the end the plaintiff's amended chamber summons dated 10.4.2007 is allowed in terms of prayer 4 of the application. The plaintiff should file a written undertaking as to damages within the next 7 days.

For the plaintiff to benefit fully from this injunction, she must expedite completion of pretrial proceedings to pave way for the early trial of this action.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Oyalo for the applicant and Mungai for the defendant.

F. AZANGALALA

JUDGE

10/7/07