



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 327 of 2007

JONAH WANJOHI GITONGA..... PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT

KINYANJUI WANJU T/A DOLPHIN AUCTIONEERS.....2ND DEFENDANT

RULING

Before me is an application by the plaintiff expressed to be brought under the provisions of order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicant primarily seeks an injunction to restrain the 1st defendant its servants or agents from selling, transferring, charging or howsoever disposing off or alienating the plaintiff's title and right to ownership and possession of title number Laikipia/Munyonyoti/11/19 in Laikipia District (hereinafter "**the suit property**") pending hearing and determination of this suit.

The grounds for the application as expressed on the face of the application are want of statutory power of sale; want of statutory notices and service thereof; want of cause of action and lack of locus standi to enforce the security. The plaintiff further says that he will suffer irreparable loss and damage.

The application is supported by an affidavit of the plaintiff in which it is deponed inter alia that the plaintiff was advanced KShs.150,000.00 by Home Savings and Mortgages Ltd; He defaulted because of intervening impossibilities which the latter accepted and did not serve any statutory notice; That the said Home Savings and Mortgages was forcibly taken over by the Central Bank of Kenya and its doors locked up; That subsequently the 1st defendant was incorporated and took over the business of the said Home Savings and Mortgages Limited an occurrence that was not communicated to the plaintiff; That the 1st defendant should have made its demand for payment within 3 years of the Loan period but did not and therefore acquiesced in the plaintiff's default and in the premises lost its right to enforce the security; That the 1st defendant has neither served a statutory notice of sale nor auctioneers notices; that the 1st defendant sold the suit property on 13.5.2007 to a purchaser at the moment unknown to the plaintiff; That the demand for KShs.3,382,881/25, when only KShs.150,000/= was lent, is unconscionable, against public policy and unenforceable and that unless the injunction is granted, the defendants will transfer the suit property unlawfully. The 1st defendant has filed a replying affidavit in opposition to the plaintiff's application.

When the application came up for hearing before me, on 23.10.2007 neither counsel for the defendants nor the defendants themselves appeared with the result that the application proceeded ex-parte. Counsel substantiated the grounds for the application and took me through the affidavits and submitted that his client had satisfied the conditions for the grant of an interlocutory injunction.

I have considered the application, the affidavits and the submissions of counsel. Having done so, I am persuaded that the plaintiff has a prima facie case with a probability of success at the trial. He has challenged the charge instrument and the statutory notice of sale among other challenges. Prima facie the statutory notice would appear to be defective. Accordingly, the defendants' action was probably an unlawful violation of the plaintiff's equitable and legal right to redeem the charge as the power of sale was not in my view exercisable.

Being of that persuasion and in view of the fact that the defendants did not appear to urge their view, I think this is a

fit and proper case for the exercise of judicial discretion in granting an injunction to the plaintiff as I am also persuaded that the plaintiff would suffer an injury which would not be compensable by an award of damages if the injunction is declined.

I accordingly order that an interlocutory injunction should issue restraining the 1st defendant, its servants, or agents from selling, transferring, charging, or howsoever disposing off or alienating the plaintiff's title and right to ownership and possession of LR No. Laikipia/Munyonoyoti/11/19 within Laikipia District or howsoever interfering with the plaintiff's possession use and ownership thereof pending the hearing and determination of this suit.

The plaintiff should file a written undertaking as to damages within the next 7 days. The costs of this application will be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Wamalwa for the plaintiff.

F. AZANGALALA

JUDGE

26/11/07