



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 617 of 2006

FREDRICK GACHUHI NGATIRI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

R U L I N G

By a Chamber Summons dated 9th November 2006, Fredrick Gachuhi Ngatiri, the Plaintiff/Applicant seeks orders *inter alia*: -

- That the court do issue an order of temporary injunction restraining the Defendant/Respondent, its servants and agents from advertising for sale, transferring, taking possession or otherwise howsoever, from exercising propriety rights over the suit premises being L.R. NO. Lari/Kirega/1545 (original number 784) pending the hearing of the suit.
- That during the pendency of the suit, all further registration or change of registration in the ownership, leasing, sub-leasing, allotment user or possession or in any kind of right, title, or interest in the suit land with any Land Registry, Government Department or any other registering authority be and is hereby prohibited.

The background to the application is that the plaintiff is the registered owner of Lari/Kiranga/1545 (original number 784), hereinafter referred to as the suit property. The plaintiff obtained loan advances from Housing Finance Company of Kenya Limited, (hereinafter referred to as the defendant) totaling Kshs.441,000/=. In consideration for the loan the plaintiff executed a Charge and a further charge over the suit property in favour of the defendant.

Sometime in the year 2000, a dispute arose between the plaintiff and the defendant over the repayment of the loan. The plaintiff claimed that contrary to the Charge instruments, the defendant was levying interest on the loan at higher rates than agreed, and levying charges, levies and penalties which were not provided for in the contract. The defendant sought to exercise its statutory power of sale over the suit property claiming that the loan was in arrears. The plaintiff filed High Court Civil Case Number 1549 of 2000 in an effort to restrain the defendant. This suit was however dismissed by the court for non-attendance.

The plaintiff did not make any further payments towards the repayments of the loan as a result of which in September 2006, the defendant in exercise of its statutory powers of sale instructed Dolphine Auctioneers who served the plaintiff with a redemption notice and a notification of sale showing that the amount due and outstanding on the mortgage was Kshs.7,185,493/40. The plaintiff demanded a statement of account from the defendant showing how the balance in the account was arrived at. Having failed to receive any co-operation from the defendant, the plaintiff approached the Interest Rates Advisory Centre (IRAC), who recalculated the mortgage account and arrived at a sum of Kshs.633,286/96 as the

amount due from the plaintiff to the defendant as at 30th October 2006.

The plaintiff thereafter attempted to negotiate with the defendant but the defendant refused and threatened to sell the suit property, thereby prompting the plaintiff to file the current suit. It is the plaintiff's contention that he was never served with the required mandatory statutory notice and therefore the purported exercise of the statutory power of sale by the defendant is illegal. The plaintiff maintains that usurious interest charges were levied on the mortgage account contrary to the charge instruments hence the difference in the calculation of the outstanding balance as arrived at by the defendant and Interest Rates Advisory Centre.

The plaintiff further maintained that he never received the statutory notice dated 17th March 2006, alleged to have been served on him through registered post as the address used was not the one contained in the charge document. Relying on the case of **Simiyu vs Housing Finance Company of Kenya (2001) 2 E A 540**, it was submitted on behalf of the plaintiff that where a statutory notice was sent to a wrong address there was no service and therefore no statutory power of sale arose.

It was submitted that the plaintiff has established that he has a *prima facie* case with a probability of success and has therefore satisfied the requirement in the case of **Giella vs Cassman Brown & Company Limited 1973 E A 358**.

Relying on the case of **Lucy Njoki Waithaka vs Industrial and Commercial Development Corporation HCCC Number 321 of 2001**, it was submitted that the plaintiff is likely to suffer irreparable loss as the suit premises was his residential home. It was contended that the plaintiff had shown that his right is being breached and there was therefore sufficient basis for granting the interlocutory injunction even if damages were to be considered an adequate remedy.

In compliance with the case of **Mrao Limited vs First American Bank**, the applicant offered to provide a Bank Guarantee for the sum of Kshs.633,286/96, being the amount due and outstanding as per the Interest Rate Advisory Centre calculation.

In response to the application, it has been submitted on behalf of the defendant that the plaintiff's suit upon which the application is predicated is *res judicata*, in view of the previous suit filed by the plaintiff, and dismissed by the court. The case of **Pop in Kenya Limited & 3 Others vs Habib Bank A G Zurich [1990] K L R 609** was relied upon for the proposition that dismissal of a suit for want of prosecution under Order XVI Rule 5 of the Civil Procedure Rules, finally determines the suit and no fresh suit can be brought under Order XVI, rule 6 of the Civil Procedure Rules. The court was urged not to entertain the application for injunction as the plaintiff ought to have come by way of review or appeal against the order of dismissal made in the first suit. In support of these submissions the following authorities were relied upon: -

· **Mburu Kinyua vs Gachiri Tuti [1978] K L R 69.**

· **Ukay Estate Limited & Another vs**

Shah Hirji Manek Limited & 2 Others

Nairobi Civil Appeal No.243 of 2001.

· **Banque Indosuez vs D. J. Lowe & Company Limited,**

Mombasa Civil Appeal No.79 of 2002 [unreported].

· **Pop in Kenya Limited & 3 Others vs**

Habib Bank AG Zurich [1990] K L R 609.

· Rev. Madara Evans Okongo vs Housing

Finance Company of Kenya Limited

Nakuru HCCC No.262 of 2005.

It was further submitted that the plaintiff was coming to a court of equity but was not prepared to do equity. This was evident in the fact that by his own admission plaintiff was indebted to the defendant, and had made no repayments since the year 2000. Secondly, plaintiff had failed to comply with the conditional order of injunction granted to him in the previous suit.

It was maintained that the plaintiff was served with the mandatory statutory notice. The court was further urged to find the balance of convenience in favour of the defendant as the value of the suit premises far outstripped the amount owed by the plaintiff. It was submitted that in accordance with the decision in the case of Mrao vs First American Bank of Kenya Limited and 2 Others, [2003] K L R 125, the injunction could only be granted if the plaintiff deposits the total amount outstanding as per the statutory notice. It was submitted that the plaintiff had failed to establish any *prima facie* case with a probability of success.

I have carefully considered this application, the affidavit in support and in reply, the submissions of counsels and the authorities cited. In my considered view, the main issue is whether the plaintiff has established a *prima facie* case with a probability of success upon which an order of interlocutory injunction can be predicated.

From the affidavit evidence, there is a clear admission that the plaintiff obtained a loan from the defendant and mortgaged the suit property as security for the repayment of the loan. It is clear that from the year 2000, the plaintiff has made no payments towards that loan. The plaintiff disputes interest and certain charges levied on the loan as falling outside the ambit of the contract.

According to the calculations done by Interest Rate Advisory Centre as exhibited by the applicant, even if the disputed charges are to be excluded there is still an amount of Kshs.633,286/96 due and outstanding from the plaintiff to the defendant in respect of the loan. The plaintiff admits as much but blames the defendant for refusing to accept his proposals for liquidation of the said amount. Nonetheless, it is apparent that there is a charge instrument which stipulates how the repayments are to be made. The defendant is not therefore bound to accept any other proposal for repayment other than what was contracted in the charge document. I find that there is *prima facie* evidence showing that the plaintiff has defaulted in the repayment of the loan giving rise to the option to the defendant to exercise its statutory power of sale.

However, Section 74 of the Registered Land Act, provides a precondition that the statutory power of sale can only be exercised after compliance with Section 74 (1) of the Registered Land Act which provides for service of a statutory notice on the chargor.

In this case the defendant contends that it served the statutory notice on the plaintiff whilst this is denied by the plaintiff. As was stated in the case of Nyangilo Ochieng & Another vs Fanuel B. Ochieng & Others, Civil Appeal Number 148 of 1995: -

“Once a chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.”

Towards this end the defendant has exhibited a copy of a statutory notice and a certificate of posting (marked as “JM 5”), as evidence of such service. Two things are apparent from a close examination of these annexures. First, although the letter is addressed to the plaintiff, the address on the letter i.e. Box 5066 Nairobi is not the plaintiff’s address as shown on the original Charge instrument or the further Charge both of which show the plaintiff’s address as 62640 Nairobi. The defendant has offered no explanation as to why that particular Box number was used.

Secondly, the certificate of posting exhibited is not clear as one cannot tell to whom the letter was actually posted and on what address. On the basis of the above, there is a reasonable doubt regarding the service of the mandatory statutory notice upon the plaintiff and this calls for an explanation from the defendant. Therefore, *prima facie* the plaintiff has established that his right to be served with a statutory notice may have been infringed by the defendant.

It is admitted that there was an earlier suit HCCC No. 1549 of 2000 between the plaintiff and defendant over the same subject matter and that this suit was dismissed for non-attendance. I find however that the plaintiff is not barred by the principle of *res judicata* in pursuing the current application as the same is premised on a subsequent statutory notice, the service of which is what is at issue. In this regard the case of **Konorero River Farm Limited vs Mohamed Yusuf & 4 Others HCCC No.1322 of 1993**, is a case in point.

In the light of the above, I would grant the application for an interlocutory injunction only to the extent of restraining the defendant from advertising for sale, selling or transferring the suit property in exercise of its statutory powers of sale pursuant to the statutory notice dated 17th March 2006. For the avoidance of doubt, it is hereby confirmed that the defendant shall be at liberty to serve a fresh statutory notice on the plaintiff.

I make no orders as to costs. Those shall be the orders of this court.

Dated, signed and delivered this 22nd day of November 2007.

H. M. OKWENGU

JUDGE