



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 287 of 2007

DANIEL KAMAU MUGAMBI.....PLAINTIFF

VERSUS

EAST AFRICA BUILDING SOCIETY.....DEFENDANT

RULING

By a Chamber Summons dated 8th June 2007, Daniel Kamau Mugambi the plaintiff/applicant seeks an order of interlocutory injunction restraining the defendant East Africa Building Society, either by itself or its agents and or servants from selling, alienating, interfering or in any way dealing with LR Nairobi Block 82/2615 Greenfields Estate (hereinafter referred to as the suit property), pending the hearing and determination of the plaintiff's suit.

In his affidavit sworn on 8th June 2007, in support of the application, the plaintiff deponed that He obtained a loan of Kshs.3 Million in June 2000, from the defendant on the security of the suit property; that He regularly serviced the loan but the defendant started heaping extra charges on the loan which made it impossible for him (plaintiff), to keep up the repayments. In the year 2002, the defendant instructed Auctioneers to sell the suit property and the plaintiff filed a suit challenging the defendant's action.

Among the annexures to the plaintiff's affidavit, is a judgment in respect of CMCC No.1484 of 2002, (a suit brought by the plaintiff against the defendant), in which the court dismissed the plaintiff's suit but ruled that the defendant would have to serve the plaintiff with another statutory notice before it can proceed with the exercise of its statutory power of sale. The plaintiff contends that contrary to that judgment the defendant has now re-advertised his property for sale without serving him with any statutory notice. The plaintiff depones that the suit property is his matrimonial home and He would therefore greatly suffer should it be sold.

Mr. Nduhiu who argued the application on behalf of the plaintiff submitted that the defendant has not shown that the mandatory statutory notice was served on the plaintiff as required under Section 74 of the Registered Land Act (Cap 300). Relying on the case of **Paul Etemesi Nandebekwa vs Simon Kitui Wakape HCCC (Bungoma) Number 82 of 2000**, Mr. Nduhiu submitted that service of a statutory notice has to be strictly proved, and that in the absence of evidence of service of the statutory notice, the right of sale does not crystallize. Mr. Nduhiu also relied on **High Court Civil Case Number 1678 of 2001 (Nairobi) Samuel K. Muigai vs Housing Finance Company of Kenya Limited & Another**, where Ringera J. made a similar ruling, that, where a plaintiff had shown a *prima facie* case that He had not been served with a valid statutory notice, the power of sale had not crystallized. The plaintiff also relied on **HCCC (Kisumu) Number 49 of 2003, John Nyabuto vs Co-operative Bank of Kenya Limited**.

The defendant opposed the application contending that the plaintiff has not fulfilled his contractual obligation, as there was evidence that the plaintiff was not regular in making payments towards the

mortgage. The defendant maintained that the plaintiff defaulted in making the loan repayments, thereby attracting default charges in accordance with Rule 32 of the Building Society Rules and Clause 8 (1) of the Charge instrument. The defendant contended that the plaintiff was properly served with a statutory notice through his last known address which is similar to the one reflected in plaintiff's affidavit. It was further contended that plaintiff was also served with another notice by the Auctioneer. It was submitted that the plaintiff having failed to clear the loan and proper notice having been served upon him the power of sale had arisen.

The defendant relied on **High Court Civil Case Number 1129 of 2002, Lawrence Muthiani Maithya vs Housing Finance Company of Kenya & Another.**

I have carefully considered this application, the affidavit in support and in reply, together with the annexures thereto, as well as the submissions of both counsels. It is evident that on the 4th March 2006, in Milimani CMCC No.1484 of 2002, a suit involving the same parties as this suit and also involving the same subject matter i.e. LR Nairobi/Block 82/2615/Greenfields Estate, the court dismissed the plaintiff's suit holding that there was sufficient evidence that the plaintiff's mortgage account was in arrears to the tune of Kshs.6,662,238.46. The plaintiff has apparently not appealed against this judgment, nor has He shown this court any *prima facie* evidence of payments made since that judgment. It is therefore possible that there is an amount due and owing from the plaintiff to the defendant in respect of the mortgage and that there is default in payment. Nevertheless, the defendant can only exercise its statutory powers of sale in accordance with the law under Section 74 of the Registered Land Act, a chargee cannot exercise his statutory power of sale unless the statutory notice has been duly served on the chargor.

The plaintiff is now seeking the intervention of this court to restrain the defendant from exercising the statutory power of sale, primarily on the ground, that the defendant has not served the plaintiff with appropriate statutory notices as ordered by the court in the judgment of 4th March 2006 and as required by law.

In Paragraph 11 of the replying affidavit sworn by Michael Githinji Tanu, the defendant's legal officer, it is deponed that the plaintiff was duly served with a statutory notice dated 11th December 2006, "annexed and marked MTG 5 is a copy of the statutory notice and the certificate of posting". However, there is only one annexure to the affidavit marked as "MTG 5" and that annexure is a notice dated 11th December 2006, addressed to Daniel Kamau Mugambi. There is no certificate of posting annexed to confirm that indeed the notice was posted to the plaintiff and that indeed it was posted to the plaintiff's address. This issue was raised by the plaintiff's advocate and one would have expected that if the omission was inadvertent, a further affidavit would have been filed to correct the omission. However, apart from making verbal assertions that the notice was sent by registered post no evidence of such posting was tendered.

It is clear that proof of service of the statutory notice is a pre-requisite to the exercise of the defendant's statutory power of sale. I adopt the position taken by my brother Sergon J. in High Court Civil Case (Bungoma) Number 82 of 2000, that in the absence of proof of service of the statutory notice, the right of sale cannot crystallize. The defendant having been clearly cautioned by the court to serve the plaintiff with another statutory notice, it was incumbent upon it to ensure compliance.

On the evidence before me, I am satisfied that there is *prima facie* evidence that the respondent is attempting to exercise its statutory power of sale prematurely. In the circumstances, I do grant the chamber summons dated 8th June 2007, to the extent of issuing an order of interlocutory injunction restraining the defendants by itself, its agents or servants from selling, interfering or otherwise alienating LR/Nairobi/Block 82/2615 Greenfields in exercise of its statutory powers of sale based on the statutory notice dated 11th December 2006.

To this extent only does the application succeed.

Dated, signed and delivered 13th day of November 2007.

H. M. OKWENGU

JUDGE