



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 543 Of 2005

LALITABEN KANTILAL SHAHPLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.....DEFENDANT

R U L I N G

The plaintiff's chamber summons dated 30th September 2005 seeks a temporary injunction to restrain the defendant from selling property L.R. No. 209/75/15 Nairobi (herein after called the suit property), pending the determination of this suit.

The suit property is registered in the name of *Kantilal Punja Shah* (deceased) who was the late husband of the plaintiff.

Prior to the death of the registered owner he charged the suit property as security for borrowing by Kempaper Limited, Malda Transporters Limited and Africa Wastepaper Limited.

The plaintiff's case is that she got to know from her neighbours that the suit property had been advertised for public auction, which was scheduled for 6th October 2005.

The plaintiff argued that an injunction should be granted because the defendant varied the terms of the borrowings to the companies whose debts were secured by the suit property, and this was at a time when the registered owner was terminally ill in hospital and it was a variation not anticipated by the charge. That on the defendant sending its demand to the companies indebted to it a discussion ensued whereby the defendant admitted to illegal debits in the company's accounts. That the defendant had paper supplied by Kempaper Ltd for which they had not made payment to the said company. That no demand had been made by way of statutory notices. That the auctioneers Rules had been breached. That the auction of the suit property would occasion the plaintiff irreparable loss and damage. That she materially contributed to the construction of the suit property and also because the suit property is the only immovable property which she and her late husband owned.

That the defendant knew or ought to have known by exercise of due diligence that the suit property was the plaintiff's matrimonial home and her consent was not obtained before the making of the charge. The plaintiff alleged that the defendant's former managing director, Mr Dilip Shah, being a member of the Shah community, like the plaintiff, knew that the matrimonial home was constructed on joint resources of the plaintiff and her late husband.

The defendant argued that the suit property was charged as stated by the plaintiff in favour of the defendant. The defence denied variations of the terms of borrowing and stated that although another offer of lending was made by the defendant to the aforementioned companies, they failed to meet the conditions of lending and consequently the defendant did not grant them any other facilities. That the only modification to the lending was the reduction in the rate of interest payable on those loans.

The defendant admitted ordering paper from the company indebted to it but stated that the payment for that paper was payable 180 days after delivery and accordingly at the time of hearing the matter that period had not expired, and in any case that the supply of that paper was distinct from the charge over the suit property.

Defendant further argued that statutory notices were served by registered post which was envisaged by the charge and that the auctioneer had served the notices in accordance with the law.

The defendant denied that the plaintiff was an owner of the charged property, and since the charge in clause 36 (b) stated that the term chargor included personal representative and successors, the plaintiff was bound by that charge.

The defendant denied that the suit property was the plaintiff's matrimonial home and stated that the exercise of the defendant's statutory power of sale cannot be said to occasion irreparable loss. That even if it was the plaintiff's matrimonial home that would not fetter the defendant's rights.

That summarises the arguments presented before me. As I begin to consider the court's ruling I will be guided by the court of appeal decision in the case MBUTHIA – V – JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR page 1. It was held in that case as follows: -

“The correct approach in dealing with an application for interlocutory injunction is not to decide the issues of fact, but rather to weight up the relevant strength of each sides proposition. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavit facts.”

With that caution in mind the most persuasive argument raised by the plaintiff was with regard to lack of adequate notice in compliance with the law. In the first instance the notice is addressed to ‘*The Estate of the late Kantilal Punja Shah*’. I am of the view that that address cannot be faulted but then the defendant proceeded to use the box number of Kempaper Limited, and it is clear that is not the address of the plaintiff. However perhaps the greatest failing of the said notice is to be found in the second paragraph thereof. It states.

“Please be notified that unless we receive your payment of the said amount in full with interest accrued thereon as above mentioned then we shall on expiry of fourteen (14) days after the date of service of this notice, time being of essence, commence the process of selling by public auction or private treaty your captioned property currently charged to us as security.”

When the plaintiffs counsel argued that this notice violated section 69 A (1) (a) defence argued that the interest on the company's account was in arrears and the defendant was therefore entitled to make a demand under Section 69A (1) (b).

The court of appeal case of TRUST BANK Ltd – V – OKOTH [2000] I EA 274, had this to say on the provisions of Section 69 A (1) (a):

“The object of such a notice was to protect the rights of the mortgagor. The notice could be in the form of a demand for immediate payment, with an intimation that if the mortgage money was not paid within three months of service the mortgage would proceed to sell the property or it could require the mortgagor to pay the mortgage money at the end of three months period.....In this instance, the notice did not give the respondent three months to pay and was therefore invalid. The mortgage's statutory power of sale had therefore not accrued.....”

Does the defendant then, find salvation in Section 69 A (1) (b)? That section provides that mortgagee can exercise its statutory power of sale where;

“Some interest under the mortgage is in arrears and unpaid for two months, after becoming due;

The defence relied on the case of HCCC 1780 OF 2000 (Milimani) SOUTHERN CREDIT BANKING CORP Ltd – V – CHARLES WACHIRA NGUNDO where the notice sent to mortgagor was entitled “**ARREARS NOTICE**”. In our present case the defendant’s notice was not so entitled. Over and above that the aforesaid section states that the interest has to be in arrears and unpaid for two months. The defendant’s aforesaid notice did not so specify.

I find that the defendant’s notice to the Estate of *Kantilal Punja Shah* failed to meet the statutory standards and accordingly the plaintiff has made out a prima facie case with probability of success.

The defendant did argue that if the court was to find that the notice is inadequate, the court should order that another notice be issue. That perhaps might have been the correct route to take if the only issue raised by the defendant was one of notice. To the contrary the plaintiff has argued that there were variations to the lending not contemplated in the charge, that there were illegal debits made in the company’s account and finally that the plaintiff had an independent legal right by virtue of the property being a matrimonial home and by the fact that her consent was not obtained.

All these issues I believe ought to be given ventilation at a full hearing and particularly the plaintiff’s claim as the wife of the registered owner. It is arguable that perhaps a time has come in the evolution of our law where a generous consideration ought to be given to the claims of wives who lay claim against the mortgagee, where matrimonial properties are used by their husbands without notice to them and without their consent

The end result of this ruling is that:

Ø A temporary injunction do issue to restrain the defendant by itself, its agents, servants and/or employee from selling, whether by private treaty or public auction, transferring, alienating, interfering or in any way whatsoever dealing with property L.R. No. 209/75/15 Nairobi pending the hearing and determination of this suit.

Ø The plaintiff is hereby awarded costs of the chamber summons dated 30th September 2005.

Dated and signed this 15th day of February 2006.

MARY KASANGO

JUDGE

Read and Delivered by Azangalala J, this 17th day of February 2006.

F AZANGALALA

JUDGE

In the presence of: