

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 23 of 2006

BEATRICE CHELANGAT ROP.....1ST PLAINTIFF

JOSEPH KIPYEGON ROP.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT

RULING

The plaintiffs filed an application under the provisions of **Order XXXIX rule 1 and 2 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking the order of this court to restrain the defendant by means of an interlocutory injunction from selling, alienating, disposing of or interfering with the residential premises currently in the possession of the plaintiffs situate at parcel number *Nakuru Municipality/Block 3/952* pending the hearing and determination of the suit filed by the plaintiffs. The grounds in support of the application are stated on the face on the application. The application is supported by the annexed affidavits of Beatrice Chelangat Rop and Joseph Kipyegon Rop. The grounds in support of the application are that the plaintiffs contend that the defendant had notified them of its intention to sell the suit premises even after hindering the plaintiffs from repaying the mortgage. They stated that the defendant had fettered the plaintiffs' equity of redemption by making it impossible for the plaintiffs to redeem their property. They further stated that they had established a prima facie case and would suffer irreparable injury if the application of injunction is not granted. The application is opposed. George Ndirangu, the Nakuru Branch Operations Manager of the defendant swore a replying affidavit in opposition to the application. The thrust of the said affidavit is that the defendant is contending that the plaintiffs had failed to repay the loan advanced to them. The defendant further state that the plaintiffs had failed to make any effort to regularize their accounts with a view of paying off the said loan to the extent that the defendant had been left with no alternative other than to exercise its power of sale by chargee. The defendant denied the allegation by the plaintiffs that it had hindered the plaintiffs from exercising their equity of redemption.

At the hearing of the application, Mrs Wanderi learned counsel for the plaintiffs conceded that the defendant had served the plaintiffs with a statutory notice. She however submitted that the said notice was issued capriciously because the defendant did not put into consideration the fact that the 2nd plaintiff had been wrongly terminated from employment by the same defendant and therefore prevented from having means to pay off the said mortgage. She further submitted that the defendant had not paid the 2nd plaintiff his terminal dues and therefore the defendant was not at liberty to advertise the said suit premises for sale on account of failure to settle the said loan account. She submitted that the 2nd plaintiff had filed a suit which was still pending before the High Court at Kisumu in which he had challenged his unlawful termination from employment by the defendant. She submitted that the issues in dispute in that case could not be separated from the issue of the repayment of the mortgage due to the defendant. She argued that the defendant had therefore sought to exercise its power of sale as a chargee in an oppressive manner. She submitted that the plaintiffs had established a prima facie case that would enable this court to grant the order of interlocutory injunction sought.

Mr. Kisila, learned counsel for the defendant submitted that the plaintiffs had no case against the defendant as relates to the exercise of its power of sale as a chargee because the said statutory power of

sale had accrued after the plaintiffs fell in arrears in the repayment of the mortgage. He further submitted that the plaintiffs had taken no action to redeem the suit premises once they were notified that the defendant was going to exercise its power of sale as a chargee upon the expiry of the notice period. He submitted that there was no nexus between the issue of the mortgage and the issue of the termination of employment of the 2nd plaintiff by the defendant. He further submitted that the pendency of the suit by the 2nd plaintiff challenging his termination from employment was not a bar to the defendant exercising its power of sale as a chargee once the said right accrued. He argued that it was irrelevant whether or not the 2nd plaintiff was paid his terminal dues because the right to sell the suit premises and to realize the security was based on the charge document which the plaintiffs had executed independent of whether or not the 2nd plaintiff was an employee of the defendant. He urged this court to disallow the application for injunction.

I have considered the rival arguments made by counsel for the plaintiffs and counsel for the defendant. I have read the pleadings filed by the parties to this application. I have also considered the decided cases that were referred to me by the parties to this application. The issue for determination by this court is whether the plaintiffs have established a case to enable this court grant them the order of interlocutory injunction sought. The principles to be considered by this court when determining whether or not to grant interlocutory injunction are well settled. In **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86** the Court of Appeal held at page 89 as hereunder:

“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt, it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first^t one is satisfied and when the court is in doubt then the third condition can be addressed.”

In this case the plaintiffs are seeking an order of injunction to restrain the defendant from disposing of the suit premises because they claim that the 2nd plaintiff has a pending suit against the defendant over a claim of unlawful termination from employment. The 2nd plaintiff has further deponed that the defendant had not paid his terminal dues in full and therefore the defendant could not exercise its powers of sale as a chargee before the said pending issues are resolved. The defendant on the other hand has argued that the issue of non-repayment of the terminal dues and the pending case is not a bar to the defendant from exercising its power of sale as a chargee once the said right accrued.

I have considered the arguments made. It seems to me that the plaintiffs are predicating their payment of the loan due to the defendant on the pending suit at Kisumu High Court where the 2nd plaintiff has filed a suit against the defendant claiming damages for having been unlawfully terminated from employment. From the exhibits annexed to the 2nd plaintiff’s and the defendant’s affidavits, it is clear that the plaintiffs have made no effort to pay the debt owing to the defendant from the year 2000 when the 2nd plaintiff was terminated from employment. Although the 2nd plaintiff has been paid part of his terminal dues, he has made no effort to offset the loan that was advanced to him by the defendant.

In my considered view, the plaintiffs are trying to confuse issues here. The issue of the termination of employment of the 2nd plaintiff by the defendant is not germane to the issue related to whether or not the plaintiffs have been servicing their mortgage as provided for under the charge instrument. The issue of the repayment of the mortgage cannot be confused with employment status of the 2nd plaintiff neither can it be confused with the complaint by the 2nd plaintiff that he had not been paid his terminal dues in full. The fact that the defendant chose not to exercise its statutory power of sale for five years after the plaintiffs were in default thereof, does not in any way amount to estoppel to give the plaintiffs a right in law to challenge the defendant’s exercise of its power of sale as a chargee. The plaintiffs cannot allege that the defendant is exercising its power of sale acted capriciously or oppressively when in the first place they have been in breach of the provision of the said charge instrument by failing to pay the mortgage

instalments as they become due.

Having carefully evaluated the facts of this case, it is clear that the plaintiffs have no basis in law to challenge the defendant's right to exercise its power of sale as a chargee. The plaintiffs have not been prevented from redeeming the said suit premises. They have been duly notified as provided by the law. It is up to them to redeem the said property before the same is sold in a public auction by the defendant in exercise of its power of sale. The plaintiffs have therefore not established a prima facie case that will enable this court grant them the order of interlocutory injunction sought. The issue of the non payment of terminal dues and the issue of the pending suit in which the 2nd plaintiff is claiming that he was illegally terminated from employment is neither here nor there. It does not fetter the defendant's right to realize its security as per the charge instrument. It is therefore unnecessary for this court to consider the other principles enunciated in the landmark case of **Giella –vs- Cassman Brown [1973] EA 358**. The plaintiffs' application therefore lacks merit and the same is dismissed with costs.

DATED at NAKURU this 24th day of March 2006.

L. KIMARU

JUDGE