



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 1042 of 2001

NAHASHON K. MBATIA.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LTD.....DEFENDANT

RULING

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness, hospitalization and recuperation. The delay is regretted.

This is an application by the Plaintiff (by chamber summons dated 16th May, 2005) seeking the main order that the Defendant be restrained from selling the Plaintiff's property known as **Nairobi/Block 72/989, Jambo Estate**, pending hearing and determination of the suit. It is brought under Order 39, rules 1, 2, and 3 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act, Cap. 21 and Sections 69, 74 and 79 of the Registered Land Act, Cap. 300, and the Auctioneer's Act and Rules, are also quoted. The grounds for the application as stated on the face thereof are:-

- 1. That the intended sale will be in contempt of the court order issued on the 25th April, 2005.**
- 2. That the Plaintiff has not been served with mandatory statutory notice and notification of sale.**
- 3. That the Plaintiff stands to suffer irreparable loss unless the injunction sought is granted.**
- 4. That the Plaintiff wishes to appeal to the Court of Appeal on the issue of whether or not the Defendant has a statutory power of sale.**

There is a supporting affidavit sworn by the Plaintiff. There is also a supplementary affidavit sworn by him in answer to the Defendant's replying affidavit. In the replying affidavit the Defendant opposes the application upon various grounds stated therein.

I have read those affidavits. I have also given due consideration to the submissions of the learned counsels appearing. The Plaintiff is labouring under the misapprehension that there is an injunction in place restraining the Defendant from exercising its statutory power of sale. There is no such order. The order of 16th July, 2001 was in the following terms:-

“By consent (the) public auction scheduled for 19.07.2001 be and is hereby suspended. The Defendant/Respondent to file replying affidavit within seven (7) days from today. Parties to take a

hearing date for the chamber summons dated 9.07.2001 at the registry.”

It is clear that this order only suspended the specific sale scheduled for 19.07.2001. It was not a general injunction restraining the Defendant from exercising its statutory power of sale. Nyamu, J. noted as much in his ruling of 2nd July, 2003 by which he dismissed the Defendant’s application by notice of motion dated 2nd May, 2003 (for dismissal of the Plaintiff’s suit for want of prosecution). So, by exercising its statutory power of sale the Defendant will not be in contempt of any court order.

Nyamu, J., in the same ruling, noted that the Plaintiff’s application by chamber summons dated 9th July, 2001 had not been prosecuted. By that application the Plaintiff had sought temporary injunction to restrain the Defendant from exercising its statutory power of sale pending hearing and determination of the suit. He also sought an order that he be allowed time to dispose of his alternative property, L.R. No. **ESCARPMENT/KINARI BLOCK 1/1130**, by private treaty, and for his wife’s house allowance of KShs.20,000/00 to be paid through the Defendant, all towards payment of his indebtedness to the Defendant. The application remained unprosecuted until it was withdrawn on 4th July, 2005. In the meantime the Plaintiff filed an application by notice of motion dated 12th June, 2003 for striking out the Defendant’s defence. That application was heard by Kasango, J. and refused on the 14th March, 2005. The Plaintiff then filed the present application.

I have considered the submissions of the learned counsels appearing. I have also read all the affidavits filed as well as the primary pleadings. This being an application for temporary injunction pending hearing and determination of the suit, the Plaintiff has to satisfy the court, first, that he has a **prima facie** case with a probability of success; and, second, that he stands to suffer irreparable loss unless the order sought is granted. If the application cannot be decided on those two principles, then the court must decide it on a balance of convenience.

What is the Plaintiff’s case as disclosed by his pleadings? In paragraph 6 of the plaint he pleads that the Defendant cannot sell the charged property by public auction without a court order as the charge document does not give the Defendant any statutory power of sale. It was held by Kasango, J. in the ruling delivered on 14th March, 2005 that the Defendant’s statutory power of sale is specifically reserved in the charge.

In paragraph 7 of the plaint the Plaintiff has admitted that he owes the Defendant money upon the charge, and that he is willing to pay it after selling his alternative property. It is to be noted that there is not even a dispute as to the sum owed, and the Plaintiff has not sought an order for an account. It is deponed in the replying affidavit sworn on behalf of the Defendant and filed on 20th May, 2005 that the amount owed by the Plaintiff as at 30th April, 2005 was over KShs. 12 million.

The Plaintiff has also pleaded in the application that he has not been served with statutory notice and notification of sale. But it does appear, **prima facie**, that he was served with the requisite statutory notice on 19th March, 2004 (see paragraph 7 of the replying affidavit) and notification of sale (paragraph 9 of the replying affidavit). In all these circumstances I hold that the Plaintiff has not established a **prima facie** case with a probability of success.

What about irreparable loss? Neither in the plaint nor in the application has the Plaintiff pleaded any special or unique attachment to the suit property. In any event, having charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the Defendant will not be in a position to meet such award. I hold, therefore, that the Plaintiff may not suffer irreparable loss.

The Plaintiff has pleaded in the application that he intends to appeal against the ruling of Kasango, J. on the issue of whether the charge reserves the Defendant’s statutory power of sale, and that towards that end he lodged a notice of appeal. However, there is no application before court under Order 41, rule 4 of the Civil Procedure Rules. Furthermore, the Plaintiff is at liberty to seek an injunction before the Court of

Appeal.

For the reasons given above I find no merit in the Plaintiff's application by chamber summons dated 16th May, 2005, and I must refuse it. It is hereby dismissed with costs to the Defendant. The interim order of injunction granted on 17th May, 2005 is hereby vacated. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10th DAY OF MARCH, 2006.