



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 88 of 2005

PENCLE ENTERPRISES LTD.1ST PLAINTIFF

CLEMENT THUKU IKIGU 2ND
PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA..... DEFENDANT

RULING

This application was dated at Nairobi on 17.11.2005. Strangely however it appeared to have been filed three days earlier on 14.11.2005. No explanation for the variance was offered by the applicants/plaintiffs. The application mainly seeks for orders of injunction to restrain the defendant financial company or its agents and servants, and in particular, Garam Investments Auctioneers from disposing of Title No LR. Kajiado/Ongata Rongai Township/31, by way of public auction or otherwise, pending the hearing inter partes and determination of this application and later this suit. They also seek costs of this application.

It is relevant to note that this is not the first such application. A similar one was filed on 29.9.2005 and came before my sister Wendoh J. on 30.9.2005 when the court issued restraining order against Garam Investment Auctioneers from disposing of the same property, LR No. Kajiado/Ongata Rongai Township/31 by way of public auction or otherwise pending the hearing inter partes of the application on 13.10.2005. The court file record however shows that that application was not placed before court for hearing on 13.10.2005. Instead it was brought before me on 17.3.2005 when Mr. Siagi explained that it should be extended to 9.11.2005. for a hearing since there was no judge to hear it on 13.10.2005. This court refixed it for a hearing on 9.11.2005 as requested by Mr. Siagi. On 9.11.2005 Mr. Mutinda for Siagi, withdrew the application and filed this application now before the court on 14.11.2005, and on 15.11.2005 obtained interim injunctions which stopped a public sale due to take place the same morning. This means that the auction sales arranged to take place on 4.10.2005 and that one arranged on 15.11.2005, were both halted to enable the parties be heard inter partes.

The main facts of the case are that the first plaintiff, Pencle Enterprises Limited obtained a loan of Kenya Shs. 8,568,000/-, by depositing Title No. LR. Kajiado/Ongata Rongai/31 as Security.

The 1st plaintiff admits through its, one director, Margaret N. Kanyeki, that the chargor defaulted in repaying the loan from the word go in 1999 and annexes to this application statement of accounts to confirm the said default which shows the outstanding sum to be Kshs. 28,770,369/-.

The issue before me is whether despite the admitted default by the chargor, the chargee is entitled to exercise its statutory right of sale as provided in the charge and under section 74 of the Registered Land Act, Cap 300. The plaintiff offers, if I understand Mr. Siagi for the plaintiffs sufficiently, three grounds:-

First, that an offer for a rescheduling of the loan terms made to the defendant in October 2004, has not been accepted by the defendant despite the fact that it was made in writing after discussions were made and the defendant agreed orally to consider it and despite the fact that the 1st plaintiff is ready and willing to repay by monthly instalments of Kshs 149,883/29 with effect from 30.10.2004 now past. The Court understands this to mean that the chargee having accepted to reschedule, it is not entitled to rescind and at the same time is not entitled to proceed to exercise its statutory right of sale.

The second ground from the 1st plaintiff is that the mandatory statutory notice to be served upon the chargor has never been served by the chargee.

The third ground is that the defendant's intention to sell the charged property at about Kshs. 10,000,000/- to 11,000,000/- as advertised by Garam Investment Limited on the chargee's instructions is fraudulent and sufficient ground to halt the sale until the main suit is heard and finally determined.

In reply to the first issue the defendant did not deny the fact that there were some negotiations towards a rescheduling of the debt repayment. Indeed in the records before the court there is an acceptance of the fresh schedule which shows that the loan period was extended to 15 years from 10 years and the fresh monthly instalments were to be Kshs. 149,883/29 effective 30.10.2004. However the defendant states that the fresh agreement was and shows in its face, that it was purely a without – prejudice one and majorly depended on whether the 1st plaintiff would show good faith in honouring it before the defendant would take the 1st plaintiff seriously. That the 1st plaintiff did not make any suggested instalment from 30.10.2004 and never thereafter made any other repayments.

I have carefully examined the intended rescheduling agreement. It may be said that the defendant did not follow it and did not indeed pay much attention to it. It was however in my finding a without – prejudice agreement and failure to follow it by the defendant would not reflect on the terms of the charge and the 1st plaintiff's default thereof. On the other hand the 1st plaintiff did not claim that it followed the new rescheduling agreement's terms after signing it. The plaintiff who wanted to rely on it should have made a better effort to show that it followed the agreement's terms or that it was the defendant who indeed did not pay attention to it. The court notes also that the said agreement was properly signed by the directors of the 1st plaintiff before an advocate in acceptance of its terms. It was not therefore an offer made by the 1st plaintiff and not accepted by the defendant. On the contrary, it was an offer made by the defendant and when it was accepted and signed by the 1st defendant, it became binding upon the 1st plaintiff. Unfortunately, as earlier stated, there is no evidence and none came from the 1st plaintiff, that it began paying the rescheduled instalments. In conclusion therefore, this is no ground upon which to deny the chargee its statutory right of sale.

The third issue raised is whether the defendant's advertisement showing the property's market value to be Kshs. 11,000,000/- amounted to relevant fraud which would interfere with the chargee's exercise of its statutory right of sale. Mr. Siagi tried to show that the property had been valued earlier at over 21,000,000/- and cannot now be less. It is observed from the records relied on that the first valuation which showed the value as Kshs. 21,000,000/- was done at the instruction of the 1st plaintiff and that the defendant accepted and relied on it to give the loan. This in the court's view did not at any time thereafter preclude the defendant from valuing it afresh. The true value of the property is an issue that can be settled by calling for a common fresh valuation by both parties. It need not stand on the way of the

chargee statutory right of sale.

I now turn to the second ground which I think is the more relevant one. The 1st plaintiff argued that it was not served with the mandatory three months statutory notice by the chargee warning the chargor that the charged property would be sold at the expiry of the three notice months. He also argued that even the Auctioneer failed to serve the required notices under the Auctioneers Act. In the supporting affidavit sworn by Margaret N. Manyeki on 17.11.2005, the 1st Plaintiff states that the defendant caused the suit property to be advertised to be sold on 4.10.2005 and 15.11.2005 without issuing the appropriate mandatory notice. He further stated that all the notifications of sale from the defendant were forwarded to the 2nd Plaintiff from whom the deponent claims he obtained them on 11.11.2005. (1st Plaintiff refer to exhibit "MNM5" But the exhibit is not exhibited as so). The record shows that the 1st Statutory Notice is dated 3.1.2003 and was addressed to Pencil Enterprises Limited of P. O. Box 15691 Nairobi. It gives a notice of three months after which it warns that the Chargee will exercise its statutory right of sale. It was signed by one J. Mwalimu, Assistant Manager Legal Services of the defendant. It was sent by registered post. The second similar notice appears to have been sent in a similar way and is dated 2.3.2005 and signed by one James Ochami, a duly constituted attorney of the defendant. It was also sent by Registered Post to Box 15691 Nairobi which appears to be the 1st Plaintiff post box number. The 1st plaintiff does not dispute the fact that box 15691 belongs to it. Margaret N. Manyeki only argues that she did not receive the notices until 11.11.2005 evening and fails to explain who the 2nd Plaintiff who allegedly received them and kept them, is. I notice also in an affidavit sworn by the 2nd Plaintiff, Clement Thuku Ikigu, on 29.9.2005 to halt the earlier intended sale, that his Postal box number is 15691, the same as the 1st Plaintiff's. The question then is, whether in these circumstances the 1st Plaintiff was not served with the mandatory statutory notices? I have considered the facts carefully. I am of the view and it is my finding, that the mandatory statutory notices were drawn and properly posted by registered post to the only postal address given to the Defendant by the 1st Plaintiff. If it were not so, the mail would have been returned to the sender as unclaimed, which did not happen. Instead they were received whether by the 2nd Plaintiff or by the directors who all were apparently closely connected with the 1st Plaintiff. I accordingly hold that contrary to the claim made by the 1st Plaintiff, it was most probably served with the relevant statutory notices under the contractual charge and under the relevant law. Since the 1st Plaintiff does not dispute the legality of the contents of the notices and does not dispute the legal consequences of such notices, I find that a proper and effective statutory notice was served, and I should now turn to find out whether it has satisfied the rules upon which this court can grant a favourable exercise of discretion to grant injunctions.

The principles for granting any injunction were laid down in the famous case of **Giella v. Cassman Brown & Co. (1937) E.A. 358**. The first one is whether the plaintiff/applicant has made a prima facie case with probability of success at the trial. Determination of the prima facie case will not at this stage be made on the standard required to prove civil cases but a much lesser standard leaving the case to be proved during the trial. Having concluded that the mandatory notice was served, I am also obliged to conclude that the power of sale should crystallize unless prevented by other legal reasons. No such other legal reasons were presented and proved. I therefore find that the 1st Plaintiff has not shown a prima facie case with reasonable chances of success. The second principle is whether if the injunction is not granted, damages would be an adequate remedy even if the court would for other reasonable grounds nevertheless grant an injunction. As stated in the case of **Lucy Njoki Waithaka v. ICDC. (HCCC No. 321 of 2001)**

"As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses..... By using the word "normally" the court was recognizing that there are instances where an injunction can issue even if damage would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind include the strength or otherwise of the applicant's case for violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been highhanded or oppressive this may move court of equity to say : money is not everything at all times and in all

circumstances and don't you think you can violate another citizen's rights only at the pain of damages."

In the matter before me the Defendant lent the 1st Plaintiff a large sum of money, by any ordinary standards. The applicant defaulted repayment almost at the word go. The sum lent was left by the 1st Plaintiff to grow to almost four times the amount lent. A proposal to reschedule repayment proposed and offered by the Defendant were not taken up seriously by the plaintiff despite the fact that it was created to ease the 1st Plaintiff's problem. No evidence of even a single instalment is shown to have been made. Clearly the Defendant was slow in trying to exercise its statutory power of sale. Surprisingly however, the 1st Plaintiff is shown as blaming the Defendant for latter's slowness to realise its security, a strange position indeed. According to the 1st Plaintiff, the Defendant should have moved fast to realize its security. This suggests to the court that any leeway given to the 1st Plaintiff was unappreciated. And yet the 1st Plaintiff is the one who appears to have proposed the idea of a reschedule. It is the one as well, and contrary to the position it, took who later filed application to halt the sale of the charged property.

I have considered this ground and I note as well that the 1st Plaintiff is not presenting any lawful reasons why the injunction sought should be granted except to await the final determination of this suit. The premises are commercial premises yielding not unsubstantial monthly rents. There is no complaint that rents are not being collected from tenants and there is no explanation where the rents go except to leave it to conjecture – that it is diverted to the use of the 1st Plaintiff's directors. In conclusion, it is the conduct of the 1st plaintiff, and not of the Defendant that is deplorable. Its promises to repay and its offer that it is now and here ready to start repayment cannot be, but hollow. The loan sum continues to escalate. Infact, the charged premises presently cannot in the open market fetch what can clear the indebtedness. My view is that the 1st Plaintiff fails to demonstrate that damages cannot be an adequate remedy. Nor do I find any other lawful reason why an injunction should issue in this case.

The third arm of the principle of law in Giela case is that even where there is no prima facie case under the first arm and the damages would be adequate compensation under the second arm, the court may still grant an injunction if it will be more convenient to do so taking into account all the circumstances of the case.

I have considered this point also and I am of the view that there is little in the 1st Plaintiff's case that would tilt the balance of convenience in his favour. It approaches court with dirty hands. There is even a suggestion that during the pending of this relationship after the charge was registered, the charged property changed ownership. Or that the property changed hands from the 1st Plaintiff to the 2nd Plaintiff. However, this is a serious matter which is not before this court, although it was hinted by both parties.

The conclusion is that this application has no merit. It is hereby dismissed with costs to the defendant. The defendant is at liberty to proceed with the realization of its statutory right of sale. Orders accordingly.

Dated and delivered at Machakos this 3rd day of March 2006.

D. A. ONYANCHA

JUDGE