



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

**Civil Suit 780 of 2000**

**HOUSING FINANCE COMPANY OF KENYA  
LIMITED.....PLAINTIFF**

**VERSUS**

**NGIGE KITSON MONDO.....DEFENDANT**

**RULING**

The defendant charged his property L.R. NO. 12796 (original No. 4871/6/2) (hereinafter called the suit property) for a loan of kshs 3 million. The charge is dated 1<sup>st</sup> June 1994.

The plaintiff brought the present suit under The Mortgages (special Provisional Act Cap 304, seeking to obtain possession of the suit property. A decree for possession of the suit property by the plaintiff was issued on 17<sup>th</sup> November 2000.

The defendant filed an application to set aside that decree, by an application dated 2<sup>nd</sup> March 2001. That application was not prosecuted, and indeed todate it has not been disposed, because as submitted by the defendant, the parties entered into negoication with a view to setting this matter. The defendant deponed that the plaintiff tentatively agreed to receive a global figure of kshs 2.5 million but later changed its mind. The defendant did not attach any documentary proof of such agreement of payment of kshs 2.5 million.

The defendant further deponed that another agreement was reached, whereby the defendant was to pay a global figure of kshs 4 million. Although the defendant stated in his affidavit that a firm agreement in those terms had been reached his advocates letter communicating that agreement ended in the following terms: -

**“If you can confirm the above arrangement, we shall immediately proceed to act out on (a) above.”**

The defendant confirmed that he was served with the notification of sale by the auctioneer, dated 13<sup>th</sup> March 2006, which stated that the sale of the suit property is due on 26<sup>th</sup> May 2006. The defendant disputed the amount reflected as due in that notification of sale.

On the basis of the arguments raised herein above the defendant filed a chamber summons dated 31<sup>st</sup> March 2006 brought under OXXXIX Rules 1 and 2 and under OXX1 Rule 1 (a) and 16 of the Civil Procedure Rules.

The defendant abandoned prayer No. 3 in that application and proceeded with the two remaining

prayers, namely: -

“\* That the plaintiff/respondent, its agents and or servant be restrained by an order of this court from advertising for sale, selling alienating or otherwise interfering with the defendant/applicant’s land parcel No. 12796 (original Number 4871/6/2) situated in Kikuyu until this matter is heard and determined.

· **That this Honourable court be pleased to find and declare that the notification of sale served upon the plaintiff and the intended sale of the subject land parcel schedule for 26<sup>th</sup> May 2006 are invalid and of no effect while this matter is still pending.”**

Defence learned counsel Mr Njuguna in support of the application submitted that although the defendant made some payment to the defendant, during the negotiation, that despite those payments, the plaintiff proceeded to advertise the suit property for sale. That the plaintiff’s said action was oppressive and the plaintiff is estopped by its conduct, from proceeding with the sale, of the suit property, because the understanding was that if negotiations were to fail the defendant was to prosecute his application to set aside the decree.

Defence also argued that since the plaintiff had a decree, it was entitled to realise its security and that it was on that basis that the defendant sought that the notification of sale to be invalidated.

In respect of the statutory notice of sale, the defendant argued that since it was served on the defendant in May 2004, and since some payment had been made to the plaintiff by the defendant in the interim period, that notice ought to be regarded as abandoned.

The defendant’s application was opposed. Learned counsel Mr Muriithi for the plaintiff submitted in opposition that the defendant had failed to prove a prima facie case with probability of success, one of the principles required to be fulfilled, in an injunction application as enunciated by the case GIELLA V CASSAMAN BROWN & CO LTD [1973] EA 358.

Plaintiff’s argument was on the basis that this present suit was filed under The Mortgages (special provisions) Act [Cap 304], and decree for possession was issued in default of a replying affidavit. In those circumstances plaintiff argued that an application for injunction was not available to the defendant because, temporary injunction, under Order 39, is made on the basis that there are substantive prayers in the pleadings. Here the defendant does not have a pleading and plaintiff submitted that accordingly an injunction cannot be issued in a vacuum. Plaintiff relied on the case HCCC NO. 3019 of 1996 (Milimani) MUNYU INDUSTRIES (K) LTD V THE LIQUIDATION AGENT PAN AFRICAN CREDIT & FINANCE AND ANOTHER; where the court made the following finding:

**“It seems to me at this point that the plaintiff has a prima facie case with a probability of success for a declaration that the purported sale by public auction was invalid. Unfortunately all his plaintiff craves is an injunction by itself and costs. An injunction does not exist in vacuo; it has to be incidental or oppurtement to a suit.”**

The plaintiff submitted that the failed negotiations or the decree for possession did not defeat its power of sale under the charge. In this regard the plaintiff relied on the case HCC NO: 3125 OF 1991 JOHN P O MUTERE & ANOTHER V KENYA COMMERCIAL BANK LTD, and quoted the following:

“.....once a power of sale has accrued a mortgagee has the right to exercise it. The court has no power to prevent exercise of that power if it is being properly exercised. It is a power parliament has granted a mortgagee and courts cannot and ought not to interfere if it is being exercised”.

The defendant laid emphasis on the negotiation, that allegedly were taking place as a basis to state that the same estopped the plaintiff from exercising its statutory power of sale. The courts response to that argument is that there was no evidence that such alleged negotiations resulted in a binding agreement which is legally enforceable and whose content clearly replaced the legal charge. The defendant’s

argument in this regard fails.

The defendant's contention that the notification of sale was invalid was not clearly presented to the court. Indeed there is no evidence presented before court to show its invalidity. The only argument by the defendant was that due to the part payment made by him in his account the notification of sale ought not to have been served. That argument has no legal basis and the same is rejected. The defendant in making payment was doing no more than was expected of him in terms of the legal charge, in any case the payments were irregular.

The statutory notice served on the defendant in 2004 did not lose its validity in law by passage of time.

The plaintiff's argument that a suit brought under The Mortgage (special Provisions) Act Cap 304, cannot sustain an injunction application is not correct. Section 6 of that Act provides that Civil Procedure Rules, so long as they are not inconsistent with the Act, are applicable to auctions under the Act.

However the most compelling argument and one which finds favour with the court is that the defendant has failed to prove a prima facie case with probability of success. In fact not only did the defendant fail to prove prima facie case but failed to show the basis upon which a temporary injunction can be issued. The defendant has no pending pleadings in this case, upon which, the temporary injunction would be pegged upon, and upon which the temporary injunction could be issued pending its disposal. That being the case an injunction under Order 39 of the Civil Procedure Rules cannot be issued.

In the light of the foregoing I find that no prima facie case with a probability of ultimately succeeding has been proved since there is no trial which is awaited in view of the decree issued in this matter in favour of the plaintiff which decree has not been set aside to date.

The defendant's application dated 31<sup>st</sup> March 2006 fails and the same is dismissed with costs to the plaintiff.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 25<sup>th</sup> May 2006.

MARY KASANGO

JUDGE