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

Civil Case 22 of 2006

DAVID KINYANJUI NJUGUNA…….....…….PLAINTIFF

VERSUS

NDETIKA RURAL SACCO SOCIETY LTD……...…….1ST DEFENDANT

SIMON NGOMONGE T/A DOLLAH AUCTIONS……...…….2ND DEFENDANT

R U L I N G

The plaintiff has brought this application, seeking an injunction to restrain the defendants from selling-off the suit property until the substantive suit is heard and determined. The suit property is Title Number SIGONA/925.

In support of his application, the plaintiff has provided a copy of the document of title, which shows that he is the registered owner of the suit property.

It is the plaintiff's case that he sought and obtained two loan amounts, of KShs. 1,430,000/= and KShs. 265,000/=, on 27th November 2001, and 29th April 2002, respectively. At the time of taking both loans, the plaintiff provided, as security, Loan Repayment Pledges. On both occasions, when the proceeds of loan were provided to the plaintiff, he pledged his own shares as well as a title deed. He says that the court should take notice of the fact that the shares and the title deed was not particularised in the pledge.

However, it is common ground that the plaintiff later executed a legal charge, over the suit property. But, as far as the plaintiff was concerned the said legal charge failed to specify the rate of interest that was applicable to the loans. Also, the plaintiff pointed out that the legal charge failed to make provision for default interest.

The plaintiff further submitted that the charge document did not specify that it was security for loans already advanced. For those reasons, the charge was said to be incompetent.

Furthermore, the 1st defendant is said to have issued inconsistent notices, and when the plaintiff sought clarification about the inconsistent amounts cited in the notices, the 1st defendant failed to provide any such clarification. The issue of the inconsistent amounts was said to have been compounded by the fact that the entries in the statements of account did not tally with the actual payments which the plaintiff had made to the 1st defendant. In a nutshell, the plaintiff is saying that he does not owe the amounts being claimed by the 1st defendant. For that reason, and because he lives on the suit property, together with his family, the plaintiff

believes that the defendants should be restrained, by an injunction issued by this court, from realising the security. If the plaintiff and his family were thrown out of their permanent house, which is on the suit property, they would be rendered destitute, so said the plaintiff.

After hearing the plaintiff's case, the defendants put forward a strong opposition.

First, it was pointed out that the plaintiff concedes the fact that he had executed a legal charge over the suit property, so as to make it into the security for the loans given to him, by the 1st defendant.

The defendants also pointed out that the plaintiff does not deny having defaulted in payments.

A perusal of the Loan Repayment pledge dated 27th November 2001 shows that the plaintiff was supposed to pay KShs. 39,723/= every month, for thirty-six months, from 27th November 2001 upto November 2004. Those payments would have enabled the plaintiff to repay the loan of KShs. 1,430,000/=.

And, in relation to the further loan sum of KShs. 265,000/=, the plaintiff was supposed to pay KShs. 7,362/=, for thirty-six months, from 29th April, 2002, upto April 2005.

The plaintiff has exhibited eight receipts dated between 30th October 2003 and 5th April 2005, showing that during that whole period, he had paid to the 1st defendant a total of KShs. 85,000/= only. Therefore, in my considered view, the plaintiff's bold assertion in paragraph 6 of the plaint, is wholly unsupported by evidence. He asserted that he had been repaying the said loan. But, he did not produce receipts to back his assertion. The only way he could have demonstrated that he was repaying the loan would have been by showing that he was paying Kshs. 47,085/= monthly, with effect from April 2002.

A look at the statements of account, reveals that the plaintiff paid a total of KShs. 60,000/= between 30th October 2003 and 10th September 2004. During that period, he should have paid KShs. 88,344/=. And if the sum repayable is calculated to cover the duration of the period covered in the statement of account; i.e. from 29th April 2002 to 11th May 2005, the plaintiff should have paid KShs. 265,032/=, towards the repayment of the further loan sum of Kshs. 265,000/=.

Meanwhile, in respect to the original loan sum of KShs.

1,430,000/=, the plaintiff paid Kshs. 52,611/=, between November 2001 and May 2005. During that period of time, the plaintiff ought to have paid not less than KShs. 1,568,366/=.

An analysis of those figures does not support the plaintiff's contentions, to the effect that he has been repaying the loan amounts. The plaintiff is substantially in arrears.

I also find that the 1st defendant did explain to the plaintiff which of the two demand notices was the correct one. Therefore, the plaintiff was wrong to have submitted, as he did, that the 1st defendant had failed to clarify the position. By its letter dated 10th June 2005, the 1st defendant's advocates notified the plaintiff that the letter dated 13th April 2005 had been sent in error; and that the correct statutory notice was dated 18th May 2005.

Again, the example given by the plaintiff, regarding his complaint about inaccuracies in the statement of account is of no consequence. The plaintiff showed that he made a payment of KShs.10,000/= on 4th December 2003, and that he was then issued with a receipt No. 69719. However, the statement of account shows that the receipt numbered R719, (which the plaintiff insists should be

understood to the short format of the receipt numbered 69719), was credited to the account on 4th November 2003. In effect, the statement of account shows that the plaintiff had made the payment one month earlier than he did.

If that be the case, it would imply that in calculating the outstanding balance and interest thereon, it was the plaintiff who was the beneficiary.

Of course, if the 1st defendant could err in that manner, there was a possibility that they could also make the mistake of crediting the plaintiff's account later than the date when the plaintiff made some payments. However, to assume that the 1st defendant did make any such mistakes would be no more than idle speculation, as the plaintiff has not exhibited any such error to the court. I am therefore not prepared to make any assumptions.

I also agree with the defendants, that it was not proper for the plaintiff to purport to challenge the outstanding balances now, whereas, he has been receiving statements of account. Whether or not the said statements were being sent to the plaintiff regularly, the fact remains that even when the plaintiff had become aware of the balance demanded from him, he did not challenge the same. The question is this; why did not the plaintiff challenge the balances by his letter dated 9th November 2005, yet that letter was written after the plaintiff had received both the statutory notice and the notification of sale? Of course, I am not suggesting that estoppel came into play, simply because the plaintiff did not raise the issue then. However, the plaintiff would nonetheless have to explain why he only raised the issue in these proceedings. Was it because there was only a little time as between that date, and the sale scheduled for 22nd November 2005? That is probable, but the plaintiff did not give an answer to court, and I therefore cannot speculate.

So far, it is clear that the plaintiff borrowed money from the 1st defendant, and that the plaintiff did not remit payments as regularly as he ought to have done. Consequently, the plaintiff is in arrears, and the 1st defendant was perfectly entitled to take steps to realise the security.

The fact that the plaintiff had built a permanent house on the suit property, and that he resided therein together with his family, would not be reason enough to warrant the issuance of an injunction

to restrain the chargee from realising the security. Any person who decides to offer his residential property as security cannot thereafter lament that the sale thereof would make his family destitute. By telling the bank or any other chargee, that the property would be the security for the loan facility, the chargor was saying that he (the chargor) was well aware that if he defaulted in the repayment of the loan, the chargee could proceed to sell-off the said property.

However, the law does stipulate that before a chargee can exercise his powers of sale, he has to give the requisite notices. In other words, before a chargee complies with the relevant statutory provisions, the statutory power of sale does not accrue to him.

The suit property herein is registered under The Registered Land Act (Cap. 300). By virtue of Section 65(2) of that statute, if the date for repayment of the loan is not specified in the charge instrument, the money would become repayable three (3) months after the service of a demand in writing, by the chargee. Therefore, the fact that the charge instrument herein does not specify the repayment date, does not render the charge incompetent.

Section 74 of the Registered Land Act spells out the chargee's remedies. The chargee is first required to issue a notice to the

chargor, if the chargor defaults in payment of either the principal amount or of any interest or any other periodical payment, and if the said default continues for a month. Secondly, if the chargor does not comply with a three months' statutory notice, the chargee may either appoint a receiver or alternatively sell the charged property.

In this case, the chargee issued a Notice dated 18th May 2005. The relevant part of the said statutory notice reads as follows:

"**TAKE NOTICE therefore, that pursuant to Section 69 of the Transfer of Property Act 1882, our clients will exercise their statutory power of sale of the above property charged to them, if after THREE (3) MONTHS from the date of receipt of this letter by yourselves, the said sum of KShs. 6,132,330.85 together with interest as aforesaid is not paid to our clients in full."**

Although the plaintiff did not take issue with the validity of the statutory notice, the defendants submitted that the notice was valid, notwithstanding its reference to Section 69 of the Transfer of Property Act 1882.

I am afraid that the defendants cannot be right, as the property in issue is one registered under the Registered Land Act. Section 4 of that Act provides as follows:

"**Except as otherwise provided in this Act, no other written law and practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:**

Provided that, except where a contrary intention appears, nothing in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing."

When that section is read together with the preamble to the statute, it pretty much makes the point that the Registered Land Act is supposed to be a comprehensive body of law which provides for the registration of title to land, regulation of dealings in land registered under the said statute, and for purposes connected therewith.

Section 74 (2) of the Registered Land Act stipulates as follows:

"**If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1) of this section, the chargee may**

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property.

……..**"**

Thus the chargee's statutory power of sale only accrues if the chargor fails to comply with a notice served on him under sub-section (1) of Section 74. That would imply that when a notice was issued pursuant to Section 69 of the Transfer of Property Act 1882, it does not trigger the process which causes the chargee's statutory power of sale to accrue pursuant to Section 74 (2) of the Registered Land Act. I therefore find that the plaintiff has made out a prima facie case with a probability of success, as the statutory notice may ultimately be found to be invalid. At the moment, I think that the chargee has an enormous burden of proof, in satisfying the trial court that a notice issued under the Transfer of Property Act 1882, would set in motion a valid process for realising a security registered under the Registered Land Act.

As no statutory power of sale can legitimately accrue in the absence of a valid statutory notice, on the face of the information present before me, I hold the view that the 1st defendant appears not to have the right to realise the security. Accordingly, the defendants shall be restrained, by injunction from selling, disposing, alienating, transferring or in any other way interfering with the suit property, Title No. SIGONA/925, until this suit is heard and determined. The plaintiff is awarded the costs of the application dated 17th November 2005.

However, it is hereby emphasized that should the chargee issue a valid notice, it would then become entitled to exercise its statutory power of sale. In other words, the injunction herein stems solely from the statutory notices dated 13th April 2005 and 18th May 2005. If the 1st defendant wishes to rely on either of

those notices to exercise its statutory power of sale, then the injunction shall remain in force until the suit is heard and determined. But if the chargee should issue new valid notices, in compliance with the provisions of the Registered Land Act, it would become entitled to proceed with steps to realise the security.

Dated and Delivered at Nairobi this 23rd day of May 2006.

FRED A. OCHIENG

JUDGE