



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 30 of 2006

SAMUEL MWANGI KANUBI PLAINTIFF

VERSUS

BANK OF INDIADEFENDANT

RULING

The Plaintiff filed this suit by plaint dated 30th January, 2006 seeking the following reliefs:

“(a) That a permanent injunction do issue restraining the Defendant whether by itself and/or its agents, its servants and/or employees jointly and severally from interfering with, alienating, entering, selling or advertising for sale, disposing, threatening to auction or otherwise disposing of the properties commonly known as LR. NO. NGONG/NGONG/16891 Ngong Township and LR. No KAJIADO/OLCHORO-ONYORE/5813 within Kajiado District, in any manner (hereinafter the “suit property”).

(b)That a permanent injunction do issue restraining the Defendant whether by itself, its agents, servants or employees from interfering with the Plaintiff’s smooth running and enjoyment of the suit properties commonly known as LR. NO. NGONG/NGONG/16891 Ngong Township and LR. NO. KAJIADO/OLCHORO-ONYORE/5813 within Kajiado District or be restrained from taking over or in any way whatsoever from managing the suit property.

(c) A declaration that the notification of sale by Messrs. Dalai Traders (Auctioneers, Repossessors and Investigators) is defective, improper, irregular and illegal.

(d)Any other or further orders as this court shall deem fit and just in the circumstances.”

Together with the plaint the Plaintiff filed an application by chamber summons dated 30th January, 2006 seeking two main orders as follows:

“1.

2. *That temporary injunction do issue restraining the Defendant/Respondent and/or its agents, its servants and/or employees jointly and severally from interfering with, alienating, entering, selling, threatening to auction or otherwise disposing of the properties commonly known as LR. NO. NGONG/NGONG/16891, Ngong Township and LR. NO. KAJIADO/OLCHORO-ONYORE/5813, within Kajiado District, in any manner (hereinafter the “suit property”) until this suit is heard and*

fully determined.

3. ***That a temporary injunction do issue restraining Messrs. Dalali Traders (Auctioneers, Repossessors and Investigators) from disposing of the properties commonly known as LR. NO. NGONG/NGONG/16891, Ngong Township and LR. NO. KAJIADO/OLCHORO-ONYORE/5813, within Kajiado District, by way of public auction or otherwise in the sale scheduled for 3rd February 2006 or at any other time until this suit is heard and determined or until further orders of this court.***

4.”

The application is brought under Order 39 rules 1, 2, 3, 4 and 9 of the Civil Procedure Rules. Section 3A of Civil Procedure Act is also quoted.

The grounds for the application are in the effect that the intended sale of the suit properties will be unlawful, that the Defendant is driven by malice and ill motive, that one of the suit properties has the Plaintiff’s matrimonial home on it, that the auctioneer entrusted to conduct the sale of the properties is not licensed to deal with the properties, that no proper statutory notice has been duly served and that the notification of sale given by the auctioneer is defective in law. There is an affidavit sworn by the Plaintiff in support of the application.

The Defendant has opposed the application in the replying affidavit filed on 3rd February, 2006 and sworn by one ***D. VITHAL JACHAK*** who describes himself as a manager of the Defendant. The grounds of opposition contained in his replying affidavit are that the necessary and proper statutory notices were duly served upon the Plaintiff; that the auctioneer gave proper notifications of sale to the Plaintiff; that the instructed auctioneer is duly licensed to conduct the intended sales; that the Defendant harboured no malice towards the Plaintiff; that the Plaintiff owes to the Defendant monies upon the charges; and that the Plaintiff has not satisfied the judicial conditions for the granting of a temporary interlocutory injunction.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited. Applications for temporary

injunctive reliefs will be determined upon the well-known principles laid down in the case of ***GIELLA VS CASMAN BROWN LIMITED [1973] EA, 360***. The Applicant must demonstrate a ***prima facie*** case with a probability of success. He must also show that the harm likely to occur cannot be compensated by an award of damages. If in doubt that these two principles will apply, the court must decide the application upon a balance of convenience. In addition, injunctive reliefs being equitable reliefs, the court will, where appropriate, consider the conduct of the applicant prior and after coming to court and any other circumstance likely to properly influence the exercise of its discretion.

In interlocutory applications the court must resist the temptation to finally determine issues in controversy, especially where facts are in dispute. Such issues must await final determination at trial. The Plaintiff has raised several issues in his application. He alleges that the Defendant is driven by malice after their employer/employee relationship soured and terminated. He has given particulars of that malice in paragraph 18 of his plaint. I have looked at those particulars. The Plaintiff has pleaded that the Defendant is acting oppressively towards him because of matters that happened in the course of his employment but which are outside the ambit of the charge contract between them. This is a serious issue and the Plaintiff must have his day in court in regard thereto. Looking at the particulars of malice given and the averments contained in the supporting affidavit, it cannot be said that they are frivolous or vexatious. I am satisfied in regard thereto that the Plaintiff has demonstrated a ***prima facie*** case with a probability of success.

The Plaintiff has pleaded the following in paragraph 23 of the plaint:

“The Defendant has not complied with the relevant law by issuing a mandatory statutory notice and serving (it) on the Plaintiff”.

This pleading is not very clear. Is the Plaintiff saying that he was never served with statutory notice at all or is he saying that he was never served with one that complies with the law? In ground (i) of the grounds of the application on the face thereof the Plaintiff is saying that no proper statutory notice was issued or properly served. In the replying affidavit at paragraphs 4 and 5 it is deponed that statutory notices dated 7th July, 2005 were duly served. The notices are also exhibited given. I have looked at those notices. It is apparent on their face that they were served on 8th July, 2005. The notices gave the Plaintiff three months from the date of service to redeem the properties charged. The amounts required to be paid are also given. The notices, issued under Section 74 of the Registered Land Act, Cap. 300 appear *prima facie* to be in compliance with that section. However, I cannot at this stage decide this issue with finality. It must await the trial. But upon this issue I am not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success. It is also apparent from the materials placed before the court that redemption notices and notifications of sale were duly issued by the auctioneer, and in this regard also the Plaintiff has not demonstrated a *prima facie* case with a probability of success.

The point has been taken that the auctioneer cannot lawfully conduct the sales of the properties because the properties are situated within the Rift Valley whereas the auctioneer is licensed to operate only within Nairobi. It has been pointed out that the sales will be conducted in Nairobi and that the auctioneer will therefore be authorized to conduct them. I accept that position *prima facie*. No authority has been shown to me for the proposition that the sale of properties charged must be conducted where they are situated. On this issue too the Plaintiff does not in my view have a *prima facie* case with a probability of success.

The Plaintiff has demonstrated a *prima facie* case with a probability of success on one issue. So I must consider if the apprehended loss will be irreparable. It is now well established that once a piece of property is mortgaged or charged the mortgage or chargor thereby converts it into a commodity for sale because he must know that in the event of default by himself the mortgage or chargee will be entitled to exercise his statutory power of sale if so minded. Therefore the plea that any charged property is so valuable to the owner for whatever reason that its loss cannot be made good by an award of damages must be rejected. The case of **RUSSELL CO LTD V COMMERCIAL BANK OF AFRICA LTD & ANOTHER [1986] KLR, 633** was cited to me. In that 1985 case the Court of Appeal held that it was a misdirection for the Judge of the High Court to described the suit premises as a commercial undertaking for which the plaintiff could be compensated in damages whereas the premises was a property of vital concern to the plaintiff and one of its managing directors and its purpose was to provide either revenue or shelter. The Court of Appeal granted the interlocutory injunction that the High Court had refused. I do not read this case as establishing authority for the proposition that where the property is found to have been intended to earn the plaintiff revenue or provide him with shelter interlocutory injunction must always be granted. That particular holding in the case was dictated by its particular circumstances, which particulars the learned Judges of Appeal delved into at great length. Each case must depend upon its own particular circumstances. I hold that in the case at hand whatever loss the Plaintiff may suffer can easily be repaired by damages. There is no allegation that the Defendant would be unable to meet such damages.

Even upon a balance of convenience I would be inclined to refuse the application. It is apparent that the Plaintiff owes the Defendant a large sum of money upon the two charges. No immediate prospect of payment has been demonstrated. Any delay will not only prejudice the Defendant which will be hindered in recovering its dues, but will also ultimately hurt the Plaintiff as interest will keep accruing.

For all the above reasons, I find no merit in this application and I must refuse it. It is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED ON THE 19TH DAY OF MAY, 2006.