REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (Milimani Law Courts)

CIVIL SUIT 188 OF 2006

NJOROGE WA KAIRO……...…….....……PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA LIMITED…….....…...DEFENDANT

RULING

On or about 5th February 1981 the defendant granted the plaintiff a loan of kshs 500, 000 which loan was secured by a charge over the plaintiff's property **DAGORETTI/RIRUTA/S.393**.

The plaintiff now seeks an injunction to stop the defendant from selling the charged property by auction. The plaintiff's application is by chamber summons under order XXXIX Rules 1, 2, 2a, 3 and 9.

The plaintiff's argument are that, the defendant has varied the rate of interest contrary to the charge instrument. That due to excessive and exorbitant debit of that increased interest rate the plaintiff fell into arrears in the repayment of his loan. That there followed exchange of correspondence and meetings which culminated with an agreement contained in a letter dated 14th March 2006. The agreement was in the following terms:

"**We refer to our meeting and your letter dated 13th Marcy 2006, our offer dated 14th December 2005 and our various discussions on the above captioned matter refer**.

Consequently, the company has considered your case exceptionally and on a "without prejudice basis" **shall grant you 60 days subject to the following conditions: -**

(i) Receipt of the entire outstanding discounted settlement amount of kshs 3, 800. 00 in 60 days from the date of this letter (on or before 12th May 2006) of which we acknowledge receipt of our cheque numver 000226 dated 13th March 2006 of kshs 200, 000.00, hence an outstanding negociated full and final balance of kshs 3, 600, 000. 00.

(ii) In the event that payment is not made by expiry of the 60 days, we shall revert to the current outstanding balance of kshs 5, 619, 776. 15 as at 28th February 2006.

(iii) Offer lapses on 12th May 2006.

The plaintiff deponed that by his letter dated 15th March 2006 he accepted the terms of the aforesaid offer. That letter of acceptance was annexed to the plaintiff's supporting affidavit and was marked 'NK2'.

The plaintiff stated that before the 60 days period provided in the letter of offer, the defendant advertised the charged property for sale by public auction for 12th April 2006. The plaintiff argued that the power for sale was not exercisable by the defendant because; the defendant had not served the plaintiff with the statutory notice; that the sale was being conducted within the 60 days period provided in the agreement reached and that the sale would offend the provisions of Auctioneers Rules 1997.

Plaintiff's counsel argued that the defendant was not acting in good faith as required by section 77 of Registered Land Act, because after an agreement had been reached the defendant began to make arrangements for sale of the charged property.

He further argued that the plaintiff has not been served with a valid statutory notice. That the defendant served the plaintiff with a notice, dated 21st April 2004, which notice stated that the defendant intended to sell the charged property by private treaty and under the provisions of T.P.A; where as the property is registered under R.L.A. That is any case the said notice was sent to the plaintiff through post office box No. 30063 Nairobi yet the plaintiff had changed his address to P O Box 6 Kikuyu. Plaintiff relied on the case of NYANGILO OCHIENG & ANOTHER – AND – FANUEL B. OCHIENG CIVIL APPEAL NO. 148 OF 1995, where it was held:

"**It is trite that before a chargee can exercise his/her/ its statutory power of sale there must be compliance with section 74 (1) of the Registered Land Act (Cap 300, Laws of Kenya) This section obliges the chargee to serve, by registered post, the relevant statutory notice…..it is for the chargee to make sure that there is compliance with the requirements of section 74 (1) ……that burden is not in any manner on the chargor. Once the chargor alleges non receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent**."

In support of the contention that the defendant had not complied with the auctioneer's rules, plaintiff's counsel argued that, contrary to Rule 15 of The Auctioneers Rules, 1997, the defendant had not served the plaintiff with the notification of sale, prior to the planned sale of the charge property.

There are two arguments raised by plaintiff's counsel in submission and which arguments were not in the application and therefore amount to submissions from the bar. Firstly is that the defendant did not abide by Rule 15 (e) of The Auctioneers Rules, in that the auctioneer failed to leave a gap of 14 days between the advertisement and the sale; secondly was that the plaintiff had not been notified by defendant whenever the rate of interest has varied. These arguments will not be considered, by this court, in view of the fact they were not part and parcel of the plaintiff's application.

Plaintiffs counsel concluded by stating that the plaintiff had shown a prima facie case with a probability of success and that he had shown that he would suffer irreparable loss if he lost his life time investment; and if in doubt, that the court should consider that convenience tilted in favour of the plaintiff for reasons that he was prepared to redeem the loan, by private sale of the charge property, but that that sale was scuttled by the defendant's premature advertisement of sale of the charged property.

Defence opposed the application and in opposition argued; that the plaintiff has concealed or misrepresented material information since he had been served with the two statutory notices, one dated 28th August 2003, the other dated 22nd June 2005. For that reason defence stated that the plaintiff was not deserving an equitable remedy. That the plaintiff had failed to disclose the existence of a decree to vacate the charge property. That the plaintiff had in various correspondence admitted the loan and had made many proposals for settlement but those proposals had not been honoured. That accordingly the plaintiff had failed to show a prima facie case with a probability of success and had not shown irreparable loss would be suffered by him, since it is him who had charged his property and had therefore translated his property into a commodity for sale.

As I begin to consider the arguments presented before me I will be guided by the well trodden

principles in GIELLA – V – CASSMAN BROWN & CO LTD [1973] E.A. 358.

The plaintiff's argument that the defendant charged excessive and exorbitant interest rates, without backing of law or other evidence does not assist the plaintiff. That argument is rejected.

The argument that the defendant could not sell the property during the subsistence of the compromise, which had given the plaintiff 60 days to redeem the comprised figure, is well taken. The plaintiff annexed a letter dated 15th March 2006, where he accepted the terms of the offer, by the defendant dated 14th March 2006. Despite that letter being exhibited by the plaintiff to his application, the defendant did not deny that letter, in their replying affidavit. That as it may be the item period granted to the plaintiff to pay the agreed amount, that is by 12th May 2006, is now past. The court therefore cannot find that the defendant can be injucted from selling the charged property on the basis of an agreement whose term of operation have expired.

The plaintiff's argument that he was not served with the statutory notice is defeated by the letter annexed to the defendant's replying affidavit dated 28th August 2003. That statutory notice was sent to the plaintiff's address P O BOX 30063 Nairobi. It seems that the plaintiff much later on 25th May 2004 notified the defendant of his change of address. That change did not affect the notice sent earlier on 28th August 2003. The defendant proved postage by Registered post of that letter which was posted on 29th August 2003. The Plaintiff's argument is defeated by section 3 (5) of the Interpretation and General Provisions Act (Cap 2) which provides

"**Where any written law authorises or requires a document to be served by post, whether the expression "**serve" **or "**give" **or "**sent" **or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of posts**."

It was incumbent on the plaintiff to prove that he did not receive that statutory notice of 28th August 2003. That is, the evidential burden was on him. The courts finding therefore is that on a prima facie basis the plaintiff has been served with legally valid statutory notices.

The plaintiff's argument on non service of notification of sale by the auctioneer has value. Rule 15 (c) of the Auctioneers Rules provides that service of the Notification of sale ought to be on an adult member of the owner or upon the owner himself. I have looked at the auctioneers affidavit and it leaves a lot to be desired. The auctioneer begins by saying that he obtained instructions from the defendant to serve. He does not say to serve what. He then stated that he served the plaintiff's tenant, on failing to trace the plaintiff. That service was in breach of Rule 15 (c), but I am of the view that Auctioneers Rules are subsidiary legislation and their effect cannot be to defeat the provisions of statute as found in R.L.A., where the statute provides the notice that ought to be served upon a chargor. In any case the sale date of the charge property is now passed and it is hoped that the defendant will learn from this their mistake and will ensure that any other notification is properly served. All in all failure to serve that notice, however, cannot defeat the chargees rights of sale.

The court's finding is also that the plaintiff's application will also be defeated by the fact that the plaintiff, in various correspondences, admitted being indebted to the defendant. Indeed it is now accepted, as a position in law that dispute on amounts due is not a basis of granting an injunction.

In view of the findings hereof the court does hereby dismiss the plaintiff's application dated 11th April 2006 with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 12th day of June 2006

MARY KASANGO

JUDGE