REPUBLIC OF KENYA

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

Civil Case 293 of 2006

ELIZABETH WAMBUI NJUGUNA…….....……..…….PLAINTIFF

VERSUS

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

RULING

The relationship between the plaintiff and the defendant began when the plaintiff obtained a loan from the defendant of kshs 849, 100/- to enable her to purchase property known as Title Number NAIROBI/BLOCK 93/1338, herein after called the suit property. As security for the said facility the defendant obtained a charge over the suit property.

By that charge the plaintiff bound herself to repay the loan by instalments. The plaintiff has admitted that she has defaulted in her repayment of the said instalments.

The defendant has scheduled to sell the charged property on 7th July 2006, in exercise of its statutory power of sale.

The plaintiff filed a suit as well as simultaneously filed a chamber summons seeking an injunction to stop the aforesaid sale of her property by auction. The chamber summons is brought under Order XXXIX Rules 1 (a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The plaintiff stated that her failure to pay the instalments of the loan as required was not deliberate but was due to repairs that she carried out on the suit property. There were no documentary evidence of such repair so the court cannot confirm that they were carried out and if they were carried out when that was.

Considering the submissions of the plaintiff's counsel two broad grounds emerged as being the basis of the application. Firstly is that the plaintiff was not served with statutory notice before sale and; secondly that the defendant has under valued the plaintiff's property.

On the first ground the plaintiff in her supporting affidavit stated that the defendant had not served her with a mandatory statutory notice requiring her to redeem the suit property within 3 months from the date of service. Defence responded to this contention by annexing to their replying affidavit a demand letter sent to the plaintiff through post office box number 59245 Nairobi, dated 11th August 2004. The defendant also annexed the Kenya Post and telecommunication certificate of posting a registered postal article. One of the items included in the registered postal article was the said demand to the plaintiff.

Plaintiff's counsel submitted that the defendant had failed to prove service of that statutory demand

because it ought to have shown how the plaintiff was served that the defendant's certificate of posting was not mentioned in the replying affidavit. That the list of items included in the registered postal article had some alterations which alterations were not counter signed. Plaintiff relied on the authority of HCCC NO. 353 of 2002 (Milimani) CHRISTINE MARTHA WANJIRU MWANGI – V – NATIONAL BANK OF KENYA LTD, where Justice Njagi states:

……**not only is there no affidavit evidence from the defendant proving that the statutory notice was posted, but also proving the non return of the letter of Notice. Indeed, I would venture to opinion that if there is no proof of posting, it would be a lot more difficult to prove the non return of that of which there is no proof of sending**."

Plaintiff also relied on the case HCCC NO. 1678 OF 2001 (Milimani) SAMUEL KIARIE MUIGAI – V – HOUSING FINANCE CO. KENYA LTD and another where Justice Ringera stated: -

"**The other issue under this rublic is whether non service of a valid statutory notice is fatal to the exercise of the statutory power of sale by the chargee or it is an irregularity which is remediable in damages under the provisions of section 77 (3) of R.L.A …….. I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption.**

Defendants had this to say on that ground of non service of statutory demand. That once the plaintiff denied service, the defendant was obligated to prove service. In this case he said that the defendant proved postage of the notice through the same address the plaintiff uses in her affidavit in support of the present application, and that accordingly the plaintiff' contention was controverted having so controverted the plaintiff's contention defence stated that the plaintiff's counsel could not be heard from the bar to claim that the plaintiff did not receive that notice, that the plaintiff needed to have sworn an affidavit stating why she says she did not receive the notice, either because the address was wrong or she had changed her address with notice to defence. On such affidavit being sworn the defendant said it would have been obligated to show how the notice was served.

Defence relied on the case OOKO – VS – BARCLAYS BANK OF KENYA LIMITED [2002] 2 K.L.R. 394. In the case the court found where the applicant did not deny the address used to send her the statutory notice was hers, that on a prima facie basis the applicant can be said to have been served with the statutory notice.

Defendant's counsel drew the court's attention to the fact that the plaintiff had annexed to her application the auctioneer's Notification of sale, which had been sent using the same address defendant used to send the statutory notices.

On the second ground in support of the plaintiff's application, plaintiff stated that the defendant's valuation, which showed the value of the suit property to be kshs 2.5 million and the auctioneers notification of sale which showed the reserve price to be kshs 2.2 million was an under estimation of the suit property. Plaintiff's counsel attacked defendant's valuation on the basis that the valuer did not enter into the suit property to value the same, and that accordingly his valuation could not be relied upon.

Defence responded to this ground by relying on the case of KIHARA – VS – BARCLAYS BANK OF KENYA LIMITED [2001] 2 E.A. 420 where Justice had this to say: -

"…….**a person who offers his property as security for a borrowing does so knowing only too well that in the event of default in repayment of the loan such property will be sold. To put it another way, to offer a property as security for a loan is to convert it into a commodity for sale. And there is no commodity for sale whose loss cannot adequately be compensated in damages."**

Defence further submitted in opposition to the plaintiff's application that in order for the defendant to exercise its statutory right of sale of the charge property need only to prove the following : - (i) that the plaintiff is in default of payment due according to the charge; (ii) that the plaintiff had been served with

the statutory demand. Once these two are proved, that the court had no right to interfere with the defendant's exercise of its statutory right of sale. Defence relied on the case of NYAGAH V HOUSING FINANCE COMPANY OF KENYA LIMITED. CIVIL APPEAL NO. 134 OF 1987 (U.R.) In this case the court of appeal stated: -

"**Where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively**."

It is pertinent to note that although the plaintiff sought an injunction also on the ground that the defendant had loaded the plaintiff's account with illegal and unexplained charges and interest not provided for in the charge instrument, the plaintiff's counsel did not submit in support of this ground and apart from a bear statement in the plaintiff's affidavit in support of the applciaiton, there was no documentary evidence in support of the same. That ground accordingly will be assumed by the court to be abandoned.

I will begin by considering the plaintiffs assertion that she was not served with the statutory notice before sale as required by section 74 R.L.A. The plaintiff denied receipt of any such notices in her affidavit in support of the application. Once the plaintiff makes that allegation of non service the defendant was required to show service. The defendant in its replying affidavit annexed the letter of demand sent to the plaintiff by registered post, dated 11th August 2004. The defendant annexed to that letter a certificate of posting a registered article which notice shows that, that letter was sent to the plaintiff on 13th August 2004. In the courts view those exhibits shifted the burden directly to the plaintiff to prove non receipt of that letter. I do not accept the plaintiff's counsel's argument that the annexed certificate of posting ought to be disregarded because it is not mentioned in the replying affidavit. The letter dated 11th August 2004 is entitled "**Registered Mail**". The certificate of posting is an accompaniment to the said letter. It cannot be disregarded because although it need not specifically be explained in the replying affidavit it proves that the aforesaid letter was indeed sent by registered post. I therefore find that failure to specifically mention the certificate of posting in the affidavit in reply is not fatal and cannot lead to such a certificate being expunged from the record.

With regard to the burden which shifted to the plaintiff to prove that she did not receive the letter, statutory notice, the court's finding gets support from section 107 (1) of the Evidence Act which provides: -

"**Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist**."

The plaintiff ought to have brought evidence to show that the letter sent by defendant was not received by her and this could have been confirmed by the post master general. The court's finding therefore on prima facie basis, on the evidence presented before me at this interlocutory stage, is that that the plaintiff was served with the statutory notice.

The plaintiff's second ground that the defendant had under valued her property. I am of the view that the plaintiff, whom it does seem denied the defendant's valuers access to the suit property, for purpose of carrying out valuation, cannot now be heard to say that the defendant's valuer's valuation cannot be relied upon since it did not take into account the improvements made internally. The court cannot in any case allow the plaintiff to obtain an injunction with that background. That as it may be the principles of injunction enunciated in the case of GIELLA – VS – CASSMAN BROWN [1973] E.A. 358, state that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. The plaintiff if the suit property was sold cannot, inview of the valuation she carried out, taking into account the improvements, the court would be in a position to quantify the damages suffered, if the court finally found that the sale was wrongly conducted.

The plaintiff does not deny being indebted to the defendant and indeed did make an offer to pay the debt. Although the plaintiff stated that she fell into arrears because she had to undertake repairs on the

suit property, the defence in their replying affidavit annexed various correspondence dating from 1994 to date where the plaintiff was informed of the arrears outstanding in her account. The plaintiff therefore in regard to the reason of falling into arrears was not truthful.

The parties hereof when the defendant offered the loan facility to the plaintiff and the plaintiff as security agreed to charge the suit property the parties entered into an agreement which agreement had contractual force. It is possible before concluding on that agreement that they bargain keenly on the terms thereof. In that regard the parties have entered into their agreement, the plaintiff cannot now seek to have the court pronounce the amount of instalments she should make which amounts would differ with the amount payable under the charge instrument. The court will resist to write the parties contract.

The court finds that the plaintiff's application fails to satisfy the first principle in GIELLA – VS – CASSMAN BROWN CO. LTD (Supra) that the plaintiff has not shown a prima facie case with a probability of success. The court having so found will decline to grant the orders sought by the plaintiff.

The order of the court is that the chamber summons dated 2nd June 2006 is dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 4th July 2006

MARY KASANGO

JUDGE