



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT KERICHO**

**Civil Suit 45 of 2006**

**AUGUSTINE KIRUI KIBET.....PLAINTIFF**

**VERSUS**

**SAVINGS & LOAN (K) LIMITED.....DEFENDANT**

**RULING**

The plaintiff, Augustine Kirui Kibet filed suit against the defendant Savings & Loan Kenya Limited seeking a permanent injunction to restrain the defendant from selling and or transferring title in respect of parcel No. L.R **Kericho/Chemagel/648** (*hereinafter referred to as the suit land*). At the time of filing the suit, the plaintiff also filed an application under **Order XXXIX Rule 2 of the Civil Procedure Rules** seeking to restrain the defendant from transferring or adversely dealing with the said suit land to the detriment of the plaintiff pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of the plaintiff. The defendant, through its Kisumu Branch manager, Joseph M. Kilel, has sworn a replying affidavit in opposition to the application.

At the hearing of the application, Mr Mutai learned counsel for the plaintiff submitted that the defendant had issued the plaintiff with a notification of sale of the suit property. The defendant had advertised that it would sell the suit property by public auction on the 13<sup>th</sup> of June, 2006. The plaintiff pleads that the suit property ought not to be sold by the defendant because the same was ancestral land where the plaintiff and the members of his family were residing in. He submitted that the plaintiff had been duped by the defendant into believing that once he had paid a certain amount of money, the title to the suit land would have been discharged by the defendant. He therefore submitted that the application for injunction should be allowed.

Mr Maondo, learned counsel for the defendant opposed the application. He submitted that the plaintiff had admitted to be indebted to the defendant; he had charged the suit property to the defendant to secure a loan amount which was advanced to him; he had defaulted in repaying the loan due and further that the suit land had already been sold in the public auction. He submitted that the plaintiff had made no allegation that the sale had been fraudulently conducted or that he had not been notified as required by the law that the defendant would sell the suit property in exercise of its statutory powers of sale as a chargee. He submitted that the application was fatally defective because the affidavit in support of the application because the *jurat* of the said affidavit was in a different page to the main body of the application. He urged the court to dismiss the application with costs.

I have carefully considered the rival submissions which were made by the counsel for the plaintiff and the counsel for the defendant. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the order of injunction suit. The principles to be considered by this court for the grant of interlocutory injunction are well settled; the plaintiff must establish that he has a *prima facie* case with high chances of success; he must also establish that he is likely to suffer irreparable loss or damage which will not be compensated by an award of damages; in the event the court would not determine the application on the above two principles, it shall determine the application on a balance of convenience (**See Giella vs Cassman Brown [1973] E.A 358**).

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff secured a loan from the defendant and charged the suit property as a security. It is not disputed that the said amount

which was requested by the plaintiff from the defendant was advanced to the plaintiff. It is further not disputed that the plaintiff defaulted in re-paying the said amount advanced to him. It is further not disputed that after the plaintiff had defaulted in re-paying the amount advanced to him, he made efforts to have the amount which had accumulated re-considered so that he could pay a lesser figure. From affidavit evidence, it is clear that the offer by the plaintiff to pay a lesser sum in settlement of the amount then due was rejected by the defendant. A statutory notice was issued to the plaintiff by the defendant. The plaintiff acknowledged receipt of the statutory notice. The defendant advertised the suit property to be sold by public auction when it chose to exercise its statutory power of sale as a chargee. Now the plaintiff complains that if the defendant exercised its statutory power of sale pursuant to the charge instrument, the suit property, which he refers to as “*ancestral land*” would be sold and he would thereby be rendered homeless together with the members of his family who include his 80 year old mother.

I have considered the arguments made. I think it is trite law that once a property is charged, it ceases to have any sentimental value. It cannot be considered as ancestral land. In actual fact, once a property is offered as a security to secure a loan, there is an underlying implication that the property becomes a commodity which can be sold; that is the reason why every charge instrument contains a clause stating that in the event that the chargor defaults in repaying the loan advanced plus interest, then the property which was offered as security may be sold by the chargee in exercise of its statutory power of sale to recover the sum advanced. In this case, the plaintiff cannot now allege that the suit property is “*ancestral land*” and therefore cannot be sold by the defendant in exercise of its statutory power of sale pursuant to the charge instrument.

In the premises therefore, I do hold that the plaintiff has not established a *prima facie* case to enable this court grant him the orders of injunction sought. His application for injunction therefore lacks merit and it is hereby dismissed with costs.

**DATED at KERICHO this 30th day of October 2006**

**L. KIMARU**

**JUDGE**