



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 179 of 2004

GEOFFREY K. MISOI PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA1ST DEFENDANT

JOEL CHERUIYOT RONO 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

ELIZABETH WANJIKU

T/a WAGLY AUCTIONEERS 4TH DEFENDANT

RULING

Geoffrey K. Misoi, the plaintiff in this matter instituted a suit against the defendants, 1st defendant, **National Bank of Kenya**, 2nd defendant, **Joel Cheruiyot Rono**, **Commissioner of Lands**, 3rd defendant and **Elizabeth Muigai t/a Wagly Auctioneers**, 4th defendant (*hereinafter referred to as the 1st, 2nd, 3rd and 4th respondents respectively*). The suit was filed on 17th June 2004 and subsequently was amended on 8th July 2004 when the 3rd and 4th defendants were included as parties.

On 20th April 2006, the plaintiff/applicant filed a Notice of Motion under **Section 3A** of the **Procedure Act** wherein he has sought for a mandatory order of injunction restraining the defendants, their agents and servants from interfering and/or in any way dealing with the land reference number **KERICHO/KAPSUSER/112** until the hearing and determination of the application.

The applicant also sought for an order restoring to him parcel of land known as from **KERICHO/KAPSUSER/112** from which he was evicted.

The grounds upon which this application is predicated are stipulated in the body of the application and the same grounds are expounded in greater detail in the supporting and supplementary affidavits of the applicant sworn on 20th April 2006 and 25th May 2006 respectively.

The gist of the matters deposed to in the said affidavits can be summarized as follows:

That the applicant was granted a loan of **Kshs.5,500,000/-** by the 1st defendant, sometime in January 1999, he filed a suit being **H.C.C.C No. 3 of 1999** at Kericho High Court where the applicant was seeking for restraining orders against the 1st defendant. The applicant claims that he paid **Kshs.15,701,103/-** and a consent was recorded withdrawing the suit. Thereafter the applicant contends that the defendant refused to negotiate the issue of interest and repayment and hence this suit was filed. The applicant complains that subsequently the 1st defendant instructed the 4th defendant to sell his land by way of private treaty at a paltry sum of **Kshs.8,200,000/-** while ignoring the amount already paid by the applicant and the value of developments which the applicant contends was over 30 million.

The applicant faulted the sale by the 4th defendant which he claims was irregularly conducted by unlicensed auctioneers and the fact that he was evicted from the premises when there was a suit pending and without a court order. It is for aforesaid reasons that he sought for the mandatory order of injunction.

On the part of the respondents, this application was opposed as lacking both merit and for being incompetent. Counsel for the 1st defendant submitted that the applicant offered his property as a security for a loan, and in default of the payment of the loan, the bank was entitled to exercise its statutory power of sale. Once the property was offered as security for a charge, it becomes a potential commodity for sale and the applicant cannot claim to have sentimental attachment over it.

As regards the order for a mandatory injunction, Counsel drew the attention of the court to the fact that the applicant did not obtain a prohibitive order, for reasons that he had filed an incompetent application, the 2nd defendant proceeded and took possession of the property which he had purchased pursuant to a sale by a chargee in exercise of their statutory power of sale under **Section 77 (2)** of the **R.L.A.** The effect of the sale was that the chargee's rights over the property were extinguished and the only remedy which the charger can pursue, is in damages.

Secondly, Counsel for the 1st defendant submitted that the applicant has not established a prima facie case with a probability of success. The plaintiff suit by way of amended plaint, the applicant's alleged that the sale was by a hurried public auction but in the application he claims it was by private treaty. Moreover the prayer for mandatory injunction is not supported by the plaint. In the case of **Pelican Investment Ltd –Vs- National Bank of Kenya E.A.L.R [2000] E.A 488 L.L.K** it was held that

“A court should not grant an injunction restraining a mortgage whose power of sale has arisen from exercising this statutory power solely on the ground that there is a dispute as to the amount due under the mortgage.”

Thus Counsel argued that although the applicant did not present any material to show the alleged over charge of interest or even the payment, the court should not interfere with the terms of a contract or the provisions of the interest charged.

These grounds were further reiterated by Counsel for the second defendant. This dispute arises out of a very common practice of a bank lending money to a customer and the customer provides a security.

In this case the security that was offered was the suit premises. The applicant defaulted in loan repayment and the 1st defendant exercised its statutory power of sale under the charge. The issue for consideration is whether in those circumstances the applicant has established a case with a probability of success to warrant the granting of an order of mandatory injunction.

The conditions for granting an order of injunction are found in the often cited case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** at page 360 in which ***Spry V P*** stated

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, a prima facie case with a probability of success. Secondly, on interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which could not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will

decide the application on the balance of convenience.”

It should be remembered that the applicant could not even convince the court to grant him an interlocutory order of injunction and how he seeks for a mandatory order of injunction and although the conditions are the same, for a mandatory order the conditions are even more strict and the order to be is granted in very clear cases.

For the foregoing reasons, I find no merit in the application dated 20th April 2006 and the same is hereby dismissed with costs to the respondents.

It is so ordered.

Ruling read and signed on 3rd November 2006.

MARTHA KOOME

JUDGE