

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 347 of 2006

CHRISTOPHER MUGWIMA MUROKIPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA1ST DEFENDANT

DAVID WANDERI T/A TAIFA AUCTIONEERS.....2ND DEFENDANT

RULING

The Plaintiff's Chamber Summons undated but filed on 29th June, 2006 is brought under Order XXXIX Rule 1, 2 and 9 of the Civil Procedure Rules. The Plaintiff seeks to restrain the Defendant until the determination of this suit from exercising its statutory power of sale and from interfering with the Plaintiff's possession of property LR. NO.DAGORETTI/KINOO/T.156. The Plaintiff in support of the application deponed that he obtained a loan advance from the 1st Defendant of Kshs.1,440,000/= which amount was payable for a period of 15 years at a monthly rate of Kshs.35,000/=. The interest applicable on that amount was at the rate of 19.9%. The Plaintiff further deponed that he had paid Kshs.900,000/= but the Defendant had failed to credit into his account the amount paid. That there was an agreement between the Plaintiff and the 1st defendant whereby it was agreed that the Plaintiff would pay the loan by the rate of Kshs.25,000/= per month with effect from 25th April, 2006. The Plaintiff on 24th April, 2006 paid into his loan account Kshs.26,000/= in fulfillment of that agreement. That before the next payment was due the 1st defendant instructed auctioneers to sell the suit property in settlement of the debt due which at the time of filing this application was Kshs.4,821,466.65. The Plaintiff is of the view that the amount due and payable by him on the loan account is Kshs.600,000/- and not the amount claimed by the 1st defendant. This amount the Plaintiff said is willing to settle at the rate agreed with the 1st Defendant. He said that the suit property is a matrimonial home where his family resides and he would therefore suffer irreparable loss and prejudice if the 1st Defendant proceeded with the sale. He further stated that the statutory notice did not comply with the law. Further that the charge in favour of the 1st Defendant failed to comply with section 44 of the Banking Act. In a further affidavit sworn by the Plaintiff, the Plaintiff deponed that the 2nd Defendant had failed to advertise the property for sale as required by the Auctioneers Rules. The Plaintiff relied on the case of **Jagjit S. Thathy v Middle East Bank Kenya Ltd. & another HCCC No.302 of 2002**. The Plaintiff's reliance on this case was on the basis that the Defendants had failed to serve him with notification of sale as required under the Auctioneers Act. The above case found that notification of sale is required under the Auctioneers Act to be served on mortgagor but the court found that it was not necessary to state the reserve price on that notification of sale. The Plaintiff also relied on the case of **Protein & Fruit Processor Ltd v Credit Bank Ltd. & 2 others HCCC No.128 of 2003**. This case found that service of notification for sale by registered post was not allowed under Rule 15 (c) of Auctioneers Act. The court proceeded to give the Plaintiff an injunction. The application was opposed and on behalf of 1st Defendant the affidavit in reply was sworn by its legal officer. He deponed that all the payments received by the 1st Defendant had been credited into the Plaintiff's loan account. That the Plaintiff had frequently written to the Defendants making proposals on how to clear his arrears on his loan account and that the letter relied upon by the Plaintiff dated 23rd March, 2006 was one such letter where the Plaintiff made proposal for payment of Kshs.25,000/= per

month. That the proposal for payment at the rate of Kshs.25,000/= per month was not acceptable to 1st Defendant and was certainly not an agreement reached by the parties. That the 1st Defendant instructed the 2nd Defendant's auctioneer to conduct the sale of the suit property after the Plaintiff failed to make payment as due on the loan account and after the statutory notices were served on the Plaintiff. The 1st Defendant annexed the statutory notice served upon the plaintiff dated 22nd February, 2005 and also annexed a certificate of posting registered postal article. The Defendant faulted the Plaintiff's attempts to challenge the rate of interest at this late stage after previously having made proposal to repay the amount due on his account. The Defendant concluded that the Plaintiff had failed to show a prima facie case with a probability of success.

Having considered the argument placed before me, I have carefully gone through the arguments raised by the Plaintiff before the court. The Plaintiff alleges that he has made payments to the 1st Defendant of Kshs.900,000/= to date. That the 1st Defendant has failed to make full credit of all the payments made. In support of that allegation the Plaintiff annexed bank statements but unfortunately those bank statements run up to the year 2003. I have gone through those statements and it does seem that there is a possibility that credit had not been given for the total amount of Kshs.148,100/=. The payments made in the year 2006, I cannot confirm whether they were credited because none of the parties annexed statements for this period. It is pertinent to note that the plaintiff in the Plaintiff does accept receipt of statutory notice sent by the 1st Defendant. What the Plaintiff has averred in the Plaintiff is that that notice fails to comply with the provisions of TPA. It is not clear which section of that Act the Plaintiff refers to. The Plaintiff's counsel in argument seems to suggest that the Plaintiff was not served with the statutory notices. That argument was responded to by the 1st Defendant when the 1st Defendant annexed the statutory notice together with the certificate of postage. It is not enough for the plaintiff to argue that it was for the 1st Defendant to prove conclusively that service was effected. The Plaintiff bore the burden to prove to the court that a letter that was sent by registered post to his post office box was not received by him. Such confirmation can be made by the Postmaster of the particular Post Office where the Plaintiff receives his mails. The Plaintiff did not get that confirmation and therefore, failed to satisfy the burden placed upon him in that regard. The Plaintiff in affidavit in support of his application, stated that the property which is being sold is valued at Kshs.7 million. The Plaintiff did not attach a valuation report to support that contention. He further stated that "according to me the balance owed to the defendant is Kshs.600,000/= and not Kshs.4,821,466.65". The Plaintiff however failed to elaborate to this court on what basis he places his aforesaid belief. There are no statements or any working out which prove that the Plaintiff's indebtedness is Kshs.600,000/=. The Plaintiff argued that the charge in favour of the 1st Defendant contravene section 44 of the Banking Act. But the Plaintiff fail to elaborate on what contravention there was to that section. With regard to the Plaintiff's contention that the notification of sale was not served upon him as required under Auctioneers Rules, I have looked at the notification of the sale and it clearly shows that it was served upon Marion Wambui Mugwima. The Plaintiff failed to state that he is not related to the person so served or that he does not reside with that person. The inference from that is that the defendant was served with notification of sale by virtue of an adult member of his family being served as required under the Auctioneers Rules. In any case the sale was scheduled to be on 4th July, 2006 now passed, and if there was no proper service of notification of sale, the court would not grant an injunction on such lack of proper service since the date of sale has since passed. That finding too, will go towards the Plaintiff's contention that the property was not advertised for sale. It would also be the same with regards to the arguments that the 1st Defendant failed to value the suit property before instructing the auctioneers. The Plaintiff's arguments that the suit property is a matrimonial home where he resides with his family, and that its sale would result in irreparable loss, cannot stand since the Plaintiff in offering the suit property as security for loan accepted that in default the property would be sold. That in deed was the finding in the **Court of Appeal Case No. NAI. 28 of 2005 (UR 18-2005) Ratilal Gova Sumaria v Fina Bank Ltd. & 2 others**. In that case the Court of Appeal had this to say in regard to the argument that the suit property is a matrimonial home:-

"But surely, that was an eventuality contemplated by the applicant when he made a decision to offer the residential property for the commercial purpose of securing a loan".

All in all, I find that the Plaintiff has failed to show a prima facie case with a probability of success and has similarly failed to show that damages would not compensate him. I have no doubt in regard to the two aforesaid principles of injunction and I would therefore, not consider the balance of convenience. The Plaintiff's application by Chamber Summons filed in court on 29th June, 2006 is hereby dismissed with costs to the Defendants.

MARY KASANGO

JUDGE

Dated and delivered this 2nd day of November, 2006.

MARY KASANGO

JUDGE