



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

Civil Case 251 of 2006

NAHASHON NJAGE NYAGGAHPLAINTIFF

VERSUS

SAVINGS & LOAN KENYA LIMITED1ST DEFENDANT

RICHARD N. NYARIKI T/A BASELINE AUCTIONEERS....2ND DEFENDANT

RULING

The Plaintiff on filing the plaint simultaneously filed a Chamber Summons dated 15th May, 2006. By that Chamber summons the Plaintiff sought to injunct the 1st Defendant from selling in exercise of its statutory power of sale the charged property registered in the Plaintiff's name. The Plaintiff swore an affidavit in support of that application. In that affidavit he confirmed that he had obtained a loan from the 1st Defendant in September, 1993. As a security for that loan the Plaintiff charged the suit property in favour of 1st Defendant. The Plaintiff amongst other reasons for granting an injunction stated that the 1st Defendant had failed to issue him with a statutory notice before setting the date for sale of the charge property. He did additionally say that the 1st Defendant was applying interest which was in excess of the maximum rate allowed to be charged by financial institutions. The court at the hearing of that application and on an application by the Plaintiff struck off the 1st Defendant's replying affidavit which had contravened Order L rule 16 of the Civil Procedure Rules. The result of that order of striking out was that the 1st Defendant was unable to present facts to the court in opposition to the Plaintiff's application. The court after hearing the application reserved its ruling which it subsequently delivered on 30th May, 2006. The court considered the various issues raised by the Plaintiff the basis upon which he sought an injunction and then stated as follows:-

“Perhaps the most damning submissions by the plaintiff was that the defendant has not served him with a statutory notice before attempting to exercise its power of sale.

The issues relating to section 39 of The Central Bank of Kenya Act and section 44 of the Banking Act are probably, in this case best left to be determined by the trial court. At that time the court will hear evidence fully and make a decision thereof.

But in the case of failure of the defendant's to give a statutory notice is on its own sufficient to show that the plaintiff has a prima facie case the purpose of a notice as stated in the case of TRUST BANK LTD - VS – GEORGE O. OKOTH” *“is to protect the rights of the mortgagor”*.

The court proceeded to grant an injunction to the plaintiff stopping the 1st Defendant from selling the charged property.

The 1st Defendant has now moved this court by Notice of Motion dated 19th June, 2006 brought under Order XXXIX Rule 4 of the Civil Procedure Rules. That notice of motion seeks an order of this court that it be pleased to discharge or set aside the injunction orders granted by this court on 30th May, 2006. The application is supported by an affidavit by the Mortgage Administration Manager of the 1st Defendant. In that affidavit the deponent stated that after considering the ruling of this court on the Plaintiff's injunction application that the 1st Defendant is of the view that the court bore in mind the Plaintiff's complaint that he had not been served with statutory notice. He was of the view that the lack of a statutory notice was actually the only ground that led the court to issue an injunction in favour of the Plaintiff. He however, stated that contrary to what was stated by the Plaintiff in its injunction application that the plaintiff was served with a statutory notice dated 26th February, 2004 by registered post by the 1st Defendant's advocate. The Plaintiff then acknowledged receipt of that letter by his letter dated 19th March, 2004. The deponent annexed a copy of that letter. It is pertinent to quote that letter written by the Plaintiff in order to be able to appreciate the 1st Defendant's argument.

“RE: STATUTORY NOTICE

LR.209/10480/152

I acknowledge receipt of your above underlined Notice dated 26th February 2004 and which is received today 19th March 2004.

In my letter NNN/PVT/F/YR/04 dated 17th February 2004 addressed to the Mortgage Admin. Manager and copied to you, I indicated that the potential buyers of my Maisonette be advised to wait until time is ripe.

I have and still I am discussing with your clients, but before checking the present position of my above letter and, perhaps, another, you have rushed to draw the Statutory Notice which has been delayed for three (3) weeks which are part of the notice.

However, I have been advised, through a letter, by your client that they are considering my presentations and that I will be advised in due course. This development, therefore, negates the said Notice”.

The deponent stated that the Plaintiff in denying service of the statutory notice upon itself made misrepresentation to the court. The deponent further stated that prior to its contemplation of the exercise of its statutory power it had caused a valuation to be made on the suit property. That valuation was annexed to the affidavit. The deponent further stated that the 1st Defendant is aggrieved by the injunction order granted herein because the same was obtained through false affidavit evidence. That the Plaintiff had a duty on presenting his injunction application to fully, frankly and honestly disclose all facts to the court. That the injunction granted by the court was hampering the 1st Defendant's rights to realize the Plaintiff's property by sale to recover Kshs.1,307,668.37. That since a full hearing of the case would take between 1 ½ to 3 years to be determined it is in the interest of justice that the court do exercise its jurisdiction by discharging the injunction granted to the Plaintiff.

The 1st Defendant relied on the case of **Ragui v Barclays Bank of Kenya Ltd [2002] 1KLR** on the following passage:-

“It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged”.

The application was opposed by the Plaintiff and in his response the Plaintiff filed his replying affidavit. In that affidavit the Plaintiff stated that the Defendant was present at the hearing of injunction application and that therefore, the Defendant's remedy lies in an appeal rather than in an application for discharge of injunction. The Plaintiff further was of the view that the court did not grant an injunction only on the ground of non service of statutory notice but that rather the court had also considered the other issues raised by the Plaintiff relating to Central bank Act, the Banking Act and the fact that the suit property was a matrimonial home. The Plaintiff reiterated that he was never served with statutory notice and that the information contained in the 1st Defendant's affidavit in support of the present application was 'manufactured' by the Defendant for the sole purpose of misleading this court to discharge the injunction. He further argued that the prayers sought by the Defendant by the present application were *res judicata* and cannot be litigated again. The Plaintiff denied withholding any information from the court during the hearing of injunction application. The Plaintiff's counsel in submission stated that for the court to entertain the Defendant's application it would be tantamount to the court sitting in an appeal of its own ruling. That an application for discharge can only be made where an injunction was issued *ex parte*. However, since the Defendant participated in the injunction application albeit that the affidavit of the Defendant was struck out by the court. That if indeed the reason why the Defendant seeks the discharge is because the suit will take too long to be determined, that it was open to the Defendant if indeed the suit took too long to apply for the discharge of injunction at that time. The Plaintiff relied on the case of **Kamunye and others v The Pioneer General Assurance Society Ltd CA No.28 of 1970**. In this case a party had claimed that the mortgage was time barred. The court held that the same was not time barred. The party's appeal to that decision was dismissed and thereafter he proceeded to file a further action claiming substantially the same reliefs. It was held in respect of the 2nd action that the same was *res judicata*. The Plaintiff also relied on the case of **Mburu Kinyua v Gachini Tuti KLR [1978] 69**. In this case too, a Defendant sought to set aside *ex parte* judgement and on recognizing that application did not disclose his defence rather than appealing against the ruling which was made proceeded to file a fresh application. That application was dismissed for being *res judicata*. Similarly in the case of **Daniel Wambua Ndavi v Peter Luka Nduku HCCC No.56 of 2004** the Defendant's defence was struck out. The defendant thereafter filed another application which in the Judge's view ought to have been made through an appeal. The 1st Defendant has moved under order XXXIX rule 4 which provides:

“Any order for an injunction may be discharged or varied, or set aside by the court on application made thereto by any party dissatisfied with such order”.

The Plaintiff was heard to argue that because the injunction was granted after *inter partes* hearing the court could not now discharge it. It is obvious from the above rule that just because an injunction was granted after *inter partes* hearing it does not make the court impotent to discharge or vary such an injunction if the justice on the case so demands. The Plaintiff did also argue that the court in granting him an injunction also considered other issues relating to alleged excessive interest applied to his loan amongst other grounds and accordingly he was of the view that the court could not now discharge the injunction simply on the issue of service of the statutory notice. The court would respond to that argument by saying that it is the duty of a party who comes to court seeking injunctive orders to bring to the court's notice of all the facts truthfully which are material to the determination of his rights to the injunction. Such a party should make the fullest possible disclosure of all material facts. The Plaintiff by his injunction application categorically denied being served with the statutory notice. He stated this in his paragraph as follows:-

“THAT to the best of my knowledge, the 1st Defendant has not served me with a proper demand and/or any Statutory Notice before seeking to auction my property. Accordingly, I am advised by Mr. George Kang'ethe Advocate which I verily believe to be true, that the intended auction is premature and illegal”.

The 1st Defendant by its present application annexed a letter written by the Plaintiff whereby the Plaintiff was acknowledging service of statutory notice upon himself. The Plaintiff did not deny that that letter was written by him but instead chose to argue that the Defendant was manufacturing documents to favour its application. That argument did not impress the court. It was necessary for plaintiff to explain the

letter and the contents thereof in view of his earlier deposition during his injunction application. It is important for the Plaintiff to realize that an injunction application seeks equitable remedy. When a party approaches a court for such a remedy they are expected to be even handed in the presentation of evidence before court. The court requires such a party to act *uberrima fide* in seeking for an injunction order. A party should not suppress the truth nor should such a party tell untruths with a view to persuading the court to grant an injunction. The court finds that the Plaintiff in this matter was not candid in his statement made during the injunction application that he was not served with statutory notice. Since the court makes that finding the court has power under Order XXXIX rule 4 of the Civil Procedure Rules to set aside such an injunction. The court would have a right to set aside an injunction even if the other grounds raised by the Plaintiff in support of his application for injunction were valid to support an injunction. That is how serious the court takes the necessity of a party being truthful when it approaches the court for an injunction. The Plaintiff when he came to court in his injunction application came seeking justice. Justice is synonymous with the truth hence why when the parties give evidence before court they are required to give such evidence under oath or after affirming. The principle of granting injunctive orders requires that a party would have clean hands. The Defendant by the present application and the annexures thereof has shown that the Plaintiff did not tell the truth when he said he was not served with statutory notice. The court having found that the Plaintiff was not truthful it would be in those circumstances repugnant to justice to allow injunctive orders which were obtained under the guise of those untruth statements to remain. The court therefore will set aside the injunction orders granted on 30th May, 2006. Before completing this ruling, however, the court would respond to the argument of the Plaintiff that the Defendant ought to have appealed by saying that this court has jurisdiction to entertain the present application by the rules stated hereinbefore. The application by the Defendant is also not caught by the doctrine *res judicata* because what the Defendant seeks is a discharge of the previous order. The present application is distinguishable from the authorities that were relied upon by the Plaintiff because in those authorities parties had either their suit or the application dismissed then rather than filing an appeal proceeded to file similar suit or application before the same court. The court therefore, rejects those arguments raised by the Plaintiff. The end of the matter is as follows:-

(1) The court hereby discharges the injunction and all consequential orders issued in this matter on 30th in respect of LR No.209/10480/152 Amboseli Court South C Nairobi dated 30th May, 2006.

(2) The costs of the Notice of Motion dated 19th June, 2006 and the costs of the Chamber Summons dated 15th May, 2006 are awarded to the Defendants.

MARY KASANGO

JUDGE

Dated and delivered this 18th day of December, 2006.

MARY KASANGO

JUDGE