



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**CIVIL CASE NO. 588 OF 2003**

**ABDUL KADER MOHAMMED.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**R U L I N G**

The Plaintiff herein seeks a temporary injunction to restrain the Defendant from realizing its security. This is by chamber summons dated 19th September, 2003 brought under Order 39, Rules 1 and 2 of the Civil Procedure Rules. The application is made upon three main grounds:-

- (i) that no proper or competent statutory notice was served upon the Plaintiff, and therefore the Defendant's statutory power of sale has not accrued;***
- (ii) the advertisement for sale published was in contravention of the Auctioneers Rules in that it gave less than 14 days before sale; and***
- (iii) the advertised reserve price of Kshs. 2,500,000.00 was far less than the market value of the property.***

The application is opposed by the Defendant upon the grounds that the statutory notice given was proper, there was no contravention of the Auctioneers Rules, and the principles for granting temporary injunctive relief have not been met by the Plaintiff. I have read the affidavits sworn in support of and in opposition to the application. I have also perused the plaint and the defence. Finally, I have given due consideration to the submissions of the learned counsels appearing, including the various cases they quoted. As argued by his learned counsel, the Plaintiff challenges the validity of the statutory notice, which is in a letter dated 28th February, 2000 addressed by the Defendant's advocates to him upon the ground that it does not satisfy the requirements of section 69 of the Indian Transfer of Property Act (ITPA) in that it does not specify that sale of the property would take place after expiry of three (3) months after service of the notice unless the outstanding sums are paid. As was observed by the Court of appeal in TRUST BANK LIMITED –VSGEORGE ONGAYA OKOTH, Civil Appeal No.1777 of 1998 (unreported), the mortgagee's statutory power of sale under section 69(1) of ITPA cannot be exercised unless and until-

***“notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service.” (section 69(A). (1) (a) of ITPA)***

That court further observed that, as pointed out in “Pusner and Brightwood’s Law of Mortgages”, the object of the notice is to guard the rights of the mortgagor, and under the statutory power of sale, that notice-

***“may be in the form of demand for immediate payment, with an intimation that if the money is not paid before the expiration of three months from the date of service, the mortgagee will proceed to sell, but it is equally effective if it is a notice to pay at the end of that period.”***

The notice dated 28th February, 2000 already mentioned, which is exhibited in the affidavit sworn in support of the application, is in the following words in the pertinent parts thereof-

***“We are instructed by our above-named client to demand immediate payment of Kshs.1,828,944/75 being the amount due by you to our client in respect of the loan granted to you at your request regarding L.R. No.631/764, full particulars whereof are known to you.***

***Our instructions are that the said sum carries interest at the rate of 45% per annum from 1st February, 2000 until payment in full.***

***Unless payment of the principal sum is received within 3 months our client will be entitled without further notice to you to sell the immoveable property charged to our client by way of security.***

***Please note also that the interest must be kept upto date since if any interest is in arrears for two months our client will be entitled immediately to sell the property without notice to you.....”***

It seems to me that the complaint of the Plaintiff in respect to this notice is without merit. The notice is in consonance with section 69(A). (1) (a) of ITPA. Even the warning that the property would be sold in default of payment, which is not required by the wording of that section, but advisable nevertheless, was given. By this notice the Plaintiff was made fully aware of the likely consequences of failure to pay the outstanding principal sum within three months of service of the notice. He was even warned that no such notice would necessary in respect to arrears of interest of two months or more. What other notice could possibly be given to him? The statutory notice dated 28th February, 2000 served upon him was proper and competent under the law, and I so hold. The advertisement for sale was published in a local daily on 8th September, 2003, the sale to take place on 22nd September, 2003. This gave less than 14 clear days between the date of publication of the advertisement and the date of sale which fell on the 14th day after the publication. This contravened Rule 15(e) of the Auctioneers Rules, 1997. But the sale did not take place as advertised as the same was stopped by an interim injunction granted ex parte on 19th September, 2003 pending hearing of the application inter partes. Should there be another sale it would have to be advertised afresh. This complaint regarding noncompliance with Rule 15(e) of the Auctioneers Rules, 1997 is thus now spent.

The Plaintiff’s final complaint is that the reserved price of Kshs.2,500,000/00 is way below the market price of the property. Again, as the advertised sale was stopped as noted above, this complaint is also spent.

In the circumstances the Plaintiff has not established a prima facie case with probability of success. I will dismiss the application with two-thirds (2/3) costs to the Defendant. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JANUARY, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS .....DAY OF JANUARY, 2005.**