

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION –MILIMANI
CIVIL CASE 811 OF 1999

KENYA COMMERCIAL BANK LIMITED PLAINTIFF

VERSUS

ERNEST KIPKORIRI KELEU1ST DEFENDANT

JOSEPH KIPNGETICH KOSKE..... 2ND DEFENDANT

RULING

In the Plaint filed in Court on 24th June 1999 the Plaintiff claimed as against the Defendants Judgment for Kshs 1,100,611.20 and Kshs 190,000/= together with interest respectively. Judgment has been entered against both Defendants. Save for execution this suit has been concluded.

On 31st March 2005 the 2nd Defendant filed this Chamber Summons. The primary prayer for my decision is prayer 3. It is for an injunction to restrain the Plaintiff from selling the 2nd Defendants L.R. No. Kericho\Kipchimchim\1408. The Application is supported by an affidavit sworn by the 2nd Defendant. The application is opposed and a Replying Affidavit sworn by one Simon J. Gathiari has been filed. The said Gathiari is the Plaintiff's Credit Analyst with the Plaintiff's Debt Recovery Unit. Counsel for the Plaintiff has also filed Grounds of Opposition.

The Application was canvassed before me on 12th April, 2005. The gist of the 2nd Defendant's case was that the Plaintiff having obtained a decree against the 2nd Defendant is estopped from pursuing the security given over the 2nd Defendant's said L.R. No. Kericho\Kipchimchim\1408. It was Counsel's view that under Section 74(3) of the Registered Land Act it was not open to the Plaintiff to sue and realize the said security at the same time. Counsel for the 2nd Defendant further argued that the Plaintiff did not serve him with a statutory notice of sale and could not therefore exercise its statutory power of sale. It was further submitted for the 2nd Defendant that the borrower i.e. the 1st Defendant is paying the sums due to the Plaintiff and the Plaintiff cannot seek to realize the said security as the 2nd Defendant would suffer double jeopardy.

Counsel for the Plaintiff in response to the submissions made on behalf of the 2nd Defendant submitted that the filing of the suit for recovery of the money advanced together with interest did not estoppe the Plaintiff from exercising its power of sale over L.R. No. Kericho\Kipchimchim 1408 as the power of sale had arisen and the filing of the suit was not inconsistent with the provisions of Section 74(3) of the Registered Land Act.

Counsel also submitted that the 2nd Defendant had been served with the requisite Statutory notices. He further argued that as the 2nd Defendant's complaints were not pleaded in the Plaint or defence he could not seek any relief in the Application. In Counsel's view no interlocutory relief could be granted in respect of issues that were not pending before Court for trial. This was particularly so in the present case where the suit has in fact been concluded. Counsel admitted that some payment had been made by the 1st Defendant but the said payment had been accounted for.

I have now considered the Application, the Affidavits, the Annextures and the Submissions of Counsels appearing. Having done so I take the following view of the matter. The factual position is that indeed this suit has been concluded save for execution. It is also not in dispute that there is no plea for injunction in the Plaint and the defence. Indeed the entire suit makes no reference to L.R. No. Kericho\Kipchimchim\ 1408. The 2nd Defendant is therefore canvassing matters that were not contemplated in the suit which suit has in any event been completed.

In my opinion the 2nd Defendant's Application does not seem to have a foundation. It is incompetent.

Before concluding this matter and for completeness of the record I would say as follows on the complaints made against the validity of the Statutory Notice of Sale. The Plaintiff exhibited the Letter dated 7th April 1995 as its Statutory Notice of Sale. This Letter gave the 2nd Defendant a period of three months from the date of the Letter to pay the charge debt. This period was inadequate and was not in accordance with the provisions of Section 74 of the Registered Land Act. The notice was therefore invalid.

However the Plaintiff has exhibited correspondence showing that the 2nd Defendant did not challenge this notice nor the subsequent shorter notices. Indeed on receipt of demands for payment the 2nd Defendant admitted the liability to the Plaintiff and made various proposals which he did not comply with. In my view despite the inadequacy of the Statutory notice of sale I would hold that the challenge made in this application is not serious and would not entitle the 2nd Defendant to the relief of an interlocutory injunction.

Regarding the challenge made against the filing of this suit and the commencement of realization of the security at the same time, I am of the view that there would be no impediment as long as accurate and lawful accounts are maintained.

In the end I find and hold that the 2nd Defendant has not surmounted the 1st hurdle set by the precedent setting case of **Giella –v- Cassman Brown & Co Ltd (1973) E.A. 358**. He has not made out a prima facie case with a probability of success at the trial.

Indeed no trial will ever be held as this case has been concluded. This finding is sufficient to dispose of the 2nd Defendant's Application dated 30th March 2005 and filed on 31st March 2005 which Application is without merit and is also incompetent. I dismiss it with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE