

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 327 of 2005

FRANCIS THUO WAIRERI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

This is an application for an injunction, to restrain the Defendant from selling, alienating or disposing of the Plaintiff's properties L.R. No. 7022/151 and L.R. No. 7022/161 Kiambu.

The application, which was brought under a Certificate of Urgency, was supported by the Plaintiff's Affidavit. The Plaintiff says that in 1998, he executed legal mortgages over the two suit properties, in favour of the Defendant, to secure a loan of Kshs. 500,000/= which was advanced to Afro Automobiles and Mortgage Limited. The Plaintiff is a director of that company, and is therefore familiar with the operations of its bank account. He says that the borrower, Afro Automobiles and Mortgage Limited, had paid over Kshs.2,000,000/= to the Defendant. That notwithstanding, the Defendant was demanding a further sum of Kshs.2,813,868.95. That amount is disputed by the Plaintiff, who contends that the loan has been paid in full. The Plaintiff also submits that the statutory notice which was issued by the Defendant was defective, as it did not stipulate that it would expire after three months from the date of service.

The relevant part of the said statutory notice, dated 1st December 1999, reads as follows:

“TAKE NOTICE that unless we receive in our chambers the said amount herein demanded together with our collection fee within THREE (3) MONTHS from the date hereof our strict instructions are to advertise for sale by public auction the above properties that is to say L.R. Nos 7022/151,7022/161, 7022/162 & 7022/166 – KIAMBU without further reference to you and at your risk as to attendant consequences which please note.”

The wording of the statutory notice is not in conformity with the provisions of Section 69A (1) (a) of the Transfer of Property Act, which provides as follows:-

“A mortgagee shall not exercise the mortgagee's statutory power of sale until and unless –

(a)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 mortgagemoney, or any part thereof, for three months after such service.”

In the light of those express words of Section 69A (1) (a), the statutory notice period should only run from the date when the notice is served on the mortgagor. It should not simply run from the date on the face of the said notice. The rationale is that until the notice has been served on the mortgagor, he is unaware of it, and therefore it would be unfair to reduce the period stipulated by law, by any period of time as may be taken in effecting service, whether it be by way of “Registered Post” or by personal service.

In the circumstances, I hold that the statutory notice herein is defective, and therefore it could not form the basis upon which the Defendant could proceed to exercise its statutory powers of sale.

Accordingly, I find merit in the Plaintiff's application. An injunction will therefore issue forthwith to restrain the defendant, whether by itself, its auctioneers or any other person howsoever, from selling alienating or disposing of the Plaintiff's properties L.R. No. 7022/151 and L.R. No. 7022/161, Kiambu, whether by public auction, private treaty or in any other way howsoever, until this suit is determined.

However, in the interests of justice, I do direct that there shall be liberty to apply.

It is so ordered.

Dated and Delivered at Nairobi, this 12th day of July 2005

FRED A. OCHIENG

JUDGE