



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL DIVISION, MILIMANI**

Civil Suit 231 of 2004

RAJ KUMARI GANDHIPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA1ST DEFENDANT

DIKEMWA ENTERPRISES LTD.2ND DEFENDANT

RULING

The applicant in this matter seeks from the court an order that an injunction do issue restraining the defendants whether by themselves, their servants or agents from advertising, selling, alienating transferring, auctioning or in any other manner whatsoever interfering with the plaintiff's property known as Nairobi/Block 32/323 Highview Estate, Nairobi, pending the hearing and determination of this suit. In the alternative, the applicant prays that an order do issue postponing the auction scheduled for 14th may, 2004.

The application is brought by a chamber summons dated 4th May, 2004 and is expressed to be made under O. XXXIX rules 1 and 2 of the Civil Procedure Rules; Rule 15 of the Auctioneers Rules, 1997; The Auctioneers Act, 1996; and S. 3A of the Civil Procedure Act. It is supported by the annexed affidavit of RAJ KUMARI GANDHI alias RAJ KUMARI w/o SAT GANDHI, and is based on the following grounds that –

1. The defendants have advertised the plaintiff's property for sale by public auction on 14th May, 2004.
2. The 1st defendant has unreasonably refused to confirm the amount due on the account or to give necessary information to enable the plaintiff to redeem the property.
3. The plaintiff has found a buyer for the suit property and yet the 1st defendant is unreasonably clogging the plaintiff's equity of redemption.
4. The intended auction is tainted with massive irregularities and illegality in that –
 - (a) the statutory notice issued by the 1st defendant on 25th July, 1998 is outdated and defective
 - (b) the Notification of Sale served upon the plaintiff by the 2nd defendant on 8th April, 2004 does not state the amount due and owing under the charge
 - (c) the valuation report which the defendants seek to rely upon for the purpose of setting the reserve price is outdated having been prepared on 26th November, 1999, and the suit property is likely to

be sold at gross undervalue.

5. It will serve the interests of equity and justice to postpone the auction scheduled for 14th May, 2004.

The application is opposed. In its grounds of opposition dated and filed in court on 10th May, 2004, the 1st defendant states as follows –

(a) The application is unmeritorious as:-

(i) the statutory notice given by the 1st defendant was in accordance with the relevant law;

(ii) the plaintiff does not dispute that money is owing to the 1st defendant on the relevant charge documents;

(iii) the right conferred on the 1st defendant mortgagee to bring the mortgaged property to sale cannot be taken away merely because the plaintiff mortgagor has found a financier

(iv) failure to procure a current/recent valuation report cannot invalidate or take away the 1st defendant's statutory right of sale.

(b) The applicant has not made out a prima facie case for the grant of an injunction.

(c) The applicant can be adequately compensated by an award of damages.

(d) The applicant has not provided the mandatory undertaking as to damages to warrant a consideration of the orders sought.

At the oral canvassing of the application, Mr. Kangethe appeared for the applicant while Mr. Ohaga appeared for the respondent. I find it prudent to mention at this juncture that after the application was filed on 4th May, 2004, it was closely followed by grounds of opposition which were filed on 10th May, 2004. At that point in time, the application was ready for hearing. However, for eight months nothing happened. Then suddenly, on 14th January, 2005, the Advocates for the 1st defendant sent by registered post a three months statutory notice to the plaintiff. It is important to note that one of the grounds of the application was that the statutory notice issued by the 1st defendant on 25th July, 1998, was outdated and defective. The defendants had already responded in their grounds of opposition and stated that statutory notice given by the 1st defendant was in accordance with the relevant law. A look at the statutory notice dated 25th July, 1998, shows an apparent defect. So far as relevant, it reads –

“...We, Barclays Bank of Kenya Limited ... hereby give you notice under the provisions of S.74 of the Registered Land Act Cap 300 of the Laws of Kenya that after expiry of THREE (3) MONTHS from the date hereof we shall exercise our power of sale and sell the charged property ...”

Our case law is replete with authorities to the effect that a statutory notice which is so worded is invalid as it is contrary to the statutory requirements. Sections 65 (2) and 74 (2) of the Registered Land Act make it clear that the statutory notice should request payment to be effected within three months after the date of service of the notice, and not three months of the date of notice. The notice dated 25th July, 1998 and served on the plaintiff was defective as it requested payment within three months of the date thereof, which is a contravention of express statutory provisions. Some of the leading authorities on that point include the **TRUST BANK LTD. v. GEORGE OKOTH**, Civil Appeal No. 177 of 1998; **TRUST BANK LTD. v. EROS CHEMISTS LTD & ANOR**, Civil Appeal No. 133 of 1999, etc in which the Court of Appeal has made it clear that a notice worded as the one dated 25th July, 1998 and served on the plaintiff herein is invalid.

For the 1st defendant's Advocates to seek to serve a properly worded notice when the defective one

was already awaiting adjudication before the court was, with profound respect and to say the least, an attempt to steal a march on the plaintiff. I therefore reject the introduction of the statutory notice dated 14th January, 2005 and hold that the statutory notice dated 25th July, 1998 was invalid, and it cannot be validated by subsequent events.

Other deficiencies that were highlighted related to the Notification of Sale and the Valuation Report. The Notification of Sale which was served on the plaintiff was flawed in three material particulars. In the first instance, while it was dated 8th April, 2004, it indicated that the suit property would be sold by public auction on 14th May, 2004. Rule 15 (b) and (d) of the Auctioneers Rules are in the following words –

“15. Upon receipt of a court warrant or letter of instruction, the auctioneer shall in the case of immovable property – (a) ...

(b) prepare a notification of sale in the form prescribed in Sale Form2, set out in the Second Schedule indicating the value of each property to be sold;

(c) ...

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set fourth in the court warrant or letter of instructions.”

In the instant case, the provisions of each of paragraphs (b) and (d) have been breached. With regard to paragraph (b), the notification of sale does not indicate the value of the property as required; and in respect of paragraph (d) the auctioneer gave a notice of 35 days instead of the mandatory 45 days. Furthermore, a valuation report relied on should be carried out not more than 12 months prior to the proposed sale. In this case, the valuation report relied on by the auctioneers as at 8th April, 2004, was dated 26th November, 1999. Almost five years later, more likely than not, the value of the property had appreciated. But that is neither here nor there. The point is that the valuation report relied on does not comply with the requirements of rule 11 (1) (b) (x) of the Auctioneers Rules, 1997. At any rate, even if the auctioneer had given not less than forty-five days notification of sale, and had given the value of property as required, and had also relied on a valuation report carried out not more than 12 months prior to the proposed sale, the matter would not have stood in any different light since no valid statutory notice had been issued.

Counsel for the respondent argued that the applicant was not entitled to the orders prayed for since there was no prayer for a mandatory injunction on which such orders could be founded. He referred the court to the case of **KIHARA v. BARCLAYS BANK (K) LTD.** [2001] 2 E.A. 420 as authority on that point. Although the application before the court is expressed to be predicated under O. XXXIX rules 1 and 2, it seems to me that the same is founded especially under rule 1 (a) since the suit property known as Nairobi/Block 32/323 Highview Estate Nairobi is in danger of being alienated by the defendant. In such circumstances, the purpose of the interim or interlocutory injunction is to preserve the disputed property, in which case it is not fatal for the application if the plaint does not contain a prayer for a permanent injunction.

In the case of **GIELLA v. CASSMAN BROWN & CO.**, [1973] E.A. 358, the conditions which must be satisfied for the grant of an interlocutory injunction are clearly spelt out. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which could not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. Applying these principles to the facts of this application, I am satisfied that the applicant has established a prima facie case with a probability of success since the statutory notice addressed by the respondent to the applicant on 25th July, 1998, is defective. I therefore grant an injunction restraining the defendants whether by themselves, their servants or agents from advertising, selling, alienating, transferring, auctioning or in any other manner whatsoever, interfering with the

property known as Nairobi/ Block 32/323, Highview Estate, Nairobi, pending the hearing and determination of this suit.

Costs in the cause.

Dated and delivered at Nairobi this 2nd day of August 2005.

L. NJAGI

JUDGE