



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 200 of 2004

**LUCY NDICHU MWAURA (Suing as the Legal Representative
or Administrator of the Estate of):**

DAVID NDICHU MWAURAPLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT

R U L I N G:

Chamber Summons dated 24/8/04 was certified urgent on 25/8/04 and fixed for hearing inter parties on 2/9/2004. On 13/9/2004 in court both parties recorded a consent that the public auction scheduled for 15.9.2004 be suspended and "Status Quo as at that day be maintained". Mention on 13/10/04 and on 10.11.04 no one attended court. On 9.8.05 the Chamber Summons was fixed for hearing on 21/9/2005. However on 27/8/05 applicant approached court with certificate urging the court to hear the matter on priority basis since there was a sale of the property scheduled for 7/9/2005. The court fixed the matter for hearing on priority basis on 5/9/05.

The applicant argues that the order issued by consent that the sale first arranged be stayed and that status quo be maintained as existing on that date has not expired and therefore she did not take any steps and the applicant was shocked to see another advertisement for sale of the same property.

The facts of this matter are explained well in the plaint. Plot No. L.R. 203/11/M.N. is registered in the name of one David Ndichu Mwaura. The said plot was offered as security to support guarantee granted to the defendant as security for a loan in the sum of Shs.1,374,990/- advanced to the Principal debtor, Mbaraki Autoworks Ltd. A charge and further charge were registered against the property in favour of the Defendant. The guarantee and the two copies of the charges are exhibited. The said Mr. David Ndichu Mwaura died on 16/5/d2003. Letters of administration intestate was granted and issued to 3 persons namely:

1. Lucy Ndichu Mwaura
2. Paul Mwaura Ndichu
3. Edward Wanyoike Ndichu on 13/2/2004.

On 16/6/2003 before grant was issued the applicant had informed the Defendant that the said David Ndichu Mwaura had died in a road accident and the family of Ndichu had put a proposal for payment to the defendant of the outstanding loan.

By letters dated 4.2003 and 15.10.2003 respectively the defendant notified David Ndichu Mwaura (deceased) and others of its intention to exercise the chargee powers of sale of the charged property belonging to the deceased.

This suit was filed by widow administrator, Lucy Ndichu Mwaura on behalf of the deceased estate to contest the Defendants exercise of powers of sale saying that the Statutory Notice was never served according to law as the chargor was already dead when the defendant purported to serve him, It was not possible to serve as the charger was dead and there was no legal representation of deceased appointed.

In the meantime the loan which stood at Shs.1,467,955.75 as on 4.8.2003 has been reduced to Shs.472,683.75 by 17.12.2004. See letter dated 17.12.2004 from Mr. Tindika for the Defendant and by 17/8/2005 by the Auctioneer DOLPHIN the debt has reduced to 211,087/- as on 30 June 2005.

In the Auctioneer Notice the property has open market value of Shs.10,500,000/-. In supporting affidavit the applicant states that on 12/9/2004 the defendant debited a total of Shs.172,839 see Annexure A. The items were explained as:

- a) Shs.80,174/- defendant's Advocates fee
- b) Shs.92,665/- to the Auctioneers.

These payments are objected to on the ground that advocate costs shall be determined after determination of suit, similarly the auctioneers fees are to be taxed or agreed upon. Exhibit marked "A" is a statement of account showing items 172,839/- 15/9/2004 and exhibit B dated 21/7/05 in reply.

As a result of the aforesaid the outstanding sum admitted amounts to Shs.30,000/- The Defendant opposes application and relies on the affidavit of GRACE Mukulu which confirms that it was the deceased who charged his property Title CR 1209 subdivision 203 Section 11 Mainland North. Affidavit also confirms that Grant was issued

13/2/04 and that no notice was served upon the estate.

The authorities relied upon are:-

1) Simiyu V. Housing Finance of Kenya HCC No.937/01 Milimani Court. Ringera J as he then was. Improper Notice sent to the wrong Box Number of Chargor see "Although any person aggrieved by an irregular exercise of the power of Sale of mortgaged property shall have a remedy in damages against the person exercising the power the irregular exercise of the power of sale of mortgaged property shall have a remedy in damages against the person exercising the power the irregularities in the exercise of the power of Sale which are remediable in damages do not comprehend failure to serve an adequate statutory Notice. See page 549 par (e) "In the matter at hand, I accept the submissions on behalf of (the Defendants) that the loss or injury is perfectly capable of being compensated in damages... . I also accept that H.F.C.K. is in a position to pay such damages"

"However, as I understand the law, it is not ordered that an interlocutory injunction can never issue where damages would be an adequate remedy and Respondent is ready to pay him. In my view the court has discretion, judicial discretion in the matter. In exercising discretion it is entitled to take into consideration the conduct of the Respondent and the gravity of the breaches of law of contract alleged. If it is shown that the Respondent has acted in high handed overbearing manner or he has flagrantly disregarded clear and mandatory provision of law equity may yet come to the assistance of the Applicant".

2) The authority of David Kimathi vs.ICDC HCC 489/2004 relates to service of statutory Notice on

the estate of a deceased. Notices were delivered upon the employees of deceased. It was held that Statutory Notice must be properly served as it forms the basis of exercise of power of sale of deceased person. A statutory Notice served after death is null and void. The same must be served upon personal representative who holds a grant. See Vol. 32 page 302 par.596 – “equity of redemption devolves on his personal representative as other estate.” The applicant here relied on other authorities which I have considered however at this stage and in the circumstances of this case I take into consideration that the bulk of loan has been paid up only a sum of Shs.211,087/- as demand and disputed. The applicant admits Shs.30,000/- only. The value of the property is put at over 10 million. It is my finding that the applicant would incur loss if the property was to be sold. The balance of convenience tilts in her favour.

Damages would not be adequate remedy. The Respondent has already received all the money it lent plus interest. The issue of debits for expenses are disputed and may be resolved at trial. In the circumstances I grant interlocutory injunction as prayed but order that the Applicant shall pay unto court Shs.211087/- with the next 21 days from today. The Defendant shall supply to the applicant a full up to date statement of Account within the next 21 days from to date.

In default of compliance by either party liberty to apply is granted to both parties to apply within 7 days after such default.

Cost reserved.

Delivered and dated this 9th day of September 2005.

J. KHAMINWA

J U D G E

9/9/05:

Khaminwa, J Jason – Clerk

Mr. Wameyo Applicant.

Mr. Tindika Respondent

Ruling read in their presence in open court.

KHAMINWA, J