



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**

**Civil Case 500 of 2005**

**CLEMENT THUKU IKIGU ..... PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO. OF KENYA LTD.....DEFENDANT**

**RULING**

The Plaintiff by his amended plaint dated 6.10.2005 and filed on the same date claimed *inter alia* an injunction restraining the Defendant from disposing off the charged properties namely title Nos. Nairobi/Block 116/1274 and Nairobi/Block 116/1295 (hereinafter called the suit properties).

The basis of the Plaintiff's claim is that in 1998 the Defendant advanced to a company called Hardy Supermarket Kshs 10,000,000/= against the security of the suit properties belonging to the Plaintiff. The said Hardy Supermarket defaulted and the Defendant appointed a receiver in August 1999. After about 5 years in January 2004 the Defendant returned the properties to the Plaintiff and demanded payment of Kshs 34,090,415/= which according to the Plaintiff was strange because the sums collectable by the Defendant during the period of receivership and the sums he had paid after receivership were sufficient to pay the loan money in full. It is also the Plaintiff's case that the Defendant did not serve him with the mandatory statutory notice of sale hence the Defendant's statutory power of sale has not arisen.

Simultaneously with the original plaint the Plaintiff filed an interlocutory application by way of Chamber Summons in which he sought a temporary injunction to restrain the disposing off of the suit properties pending the hearing and determination of the suit.

On 9.9.2005, I granted an interim injunction pending inter partes hearing which finally happened on 7.10.2005. Mr. Siagi appeared for the Plaintiff and Mr. Issa appeared for the Defendant. Counsel for the Plaintiff relied upon the supporting affidavit of the Plaintiff sworn on 9.9.2005. Reliance was also placed upon the supplementary affidavit of the Plaintiff sworn on 6.10.2005. Counsel emphasized the two grounds for the Application viz:

- 1) ***That the Defendant had failed to issue a statutory notice as required under Section 74 of the Registered Land Act and therefore the intended exercise of the power to sale is premature.***
- 2) ***That the Defendant having had a receiver in place for 5 years ought to have collected sufficient sums to pay off the Plaintiff's indebtedness to the Defendant.***

Reliance was placed upon the case of CALEB KOSITANY & OTHERS –V- ICDC AND OTHERS: NAIROBI HCCC NO.473 OF 2004 (UR) for the proposition that a Statutory Notice of Sale must not only be served upon the borrower but also upon the chargor for the Statutory power of sale to arise.

Reliance was also placed upon the case of SAMUEL KIARIE MUIGAI –V- HFCK & ANOTHER: HCCC NO.1678 OF 2001 (UR) for the same proposition that the statutory power of sale cannot arise in the absence of service of a Statutory Notice of Sale.

Further reliance was placed upon the case of JOHN KARONGO MUHU –V- HFCK & ANOTHER: HCCC NO.203 OF 2001 (UR) for the proposition that a Statutory Notice of Sale should specify how the power is going to be exercised.

With respect to the contention that the loan advanced to the borrower ought to have been fully repaid in view of the collectable amount from the suit properties by the receiver during the period of receivership, Counsel substantiated that the monthly income was Kshs 300,000/= and for the period of 56 months when the receiver was in place a sum over 17 million should have been collected which would have paid the loan in full.

Counsel also impugned the valuation report made by the Defendant in which the suit premises were valued at Kshs 22 million being the open market value and Kshs 18 million as the forced sale value. According to the Plaintiff the report omitted 6 shops and was therefore inaccurate as compared with the valuation conducted for the Plaintiff which gave the market value as Kshs 30.5 million.

Responding to the submissions on behalf of the Plaintiff Counsel for the Defendant took me through the affidavits and pointed out that a Statutory Notice of sale had been served upon the borrower M/S Hardy Supermarket Limited as envisaged under the charge which had expressly excluded the provisions of Section 74 of the Registered Land Act.

With respect to the period of receivership Counsel argued that the appointment was made in accordance with the charge which provided that the receiver was deemed to be the agent of the chargor. In the premises Counsel submitted that Plaintiff as the chargor was responsible for the acts of the receiver. Counsel contented that if the Plaintiff was unhappy with the receiver he should have complained earlier during the period of receivership.

With respect to the challenge made against the valuation report prepared on the Defendant's instructions, Counsel submitted that the opinion of the valuer and its validity had not been affected by the challenge.

In the above premises Counsel prayed that the Plaintiff's application be dismissed with costs and if the court is minded to grant a temporary injunction the same should be on the basis that a proper Statutory Notice be issued as was the case is CALEB KOSITANY AND ANOTHER –V- ICDC AND OTHERS (SUPRA).

I have considered the pleadings, the application, the affidavits, the annexures, the submissions of Counsel and the cases cited. Having done so I take the following view of the matter. The conditions for the grant of an interlocutory injunction were set out in the case of GIELLA –V- CASSMAN BROWN AND CO. (1973) E.A358. They are:-

First, the applicant must show a *prima facie* case with a probability of success at the trial but if the Court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the Applicant would suffer an injury which cannot adequately be compensated in damages.

With respect to service of a Statutory Notice of Sale, the Defendant's contention is that the same was effected as provided under the charge. The relevant part is as follows:

*“provided further that notwithstanding anything to the contrary contained herein or in the*

*Registered Land Act the Statutory power of sale and the appointment of a receiver shall be immediately exercisable by the chargee at any time after the chargee has demanded payment of any moneys from the borrower or the chargor and upon the chargor's failure to pay the same in full upon demand and the provisions contained in the said Act as to the giving of statutory notice and the giving of time for payment or restrictions on the said powers shall not apply to this security and that a receiver shall have full power to sell the property hereby charged immediately after the date of his appointment notwithstanding the absence of any notice to the chargor as is provided for in the said Act."*

It is clear from the above provision that Section 74 of the Registered Land Act was waived by the parties to the charge. The chargee however was obliged to make a demand for payment of the sums due from either the borrower or the chargor. Practically however, the chargee had still to make a demand against the chargor even if a demand had been made against the borrower. This is because the power of sale or the appointment of a receiver becomes immediately exercisable upon the chargor's failure to pay the sums in full upon demand. In my view the chargee's Statutory Power of Sale can only become exercisable if a demand has been made upon him to pay and there has been default.

The Defendant has not exhibited any demand made against the Plaintiff. A demand was however made against the borrower Hardy Supermarket Limited. But was it served? The Statutory Notice dated 1.12.2004 was addressed to the borrower at P.O. Box 10420. This is not the borrower's address given in the charge. The Defendant has not explained how the said address was obtained. The explanation that the borrower uses different addresses was with respect not sufficient or reasonable. On the material availed to the Court, I find that the Defendant did not serve a demand for payment against the borrower or the chargor. In the premises I find that the Defendant's statutory power of sale had not arisen and therefore the notification and advertisement of the suit properties was not proper.

I am satisfied that the Plaintiff has shown a *prima facie* case that he was not served with any notice either under Section 74 of the R.L.A. or under the charge.

As regards the contention that the Defendant ought to have received full payment during the 56 months of receivership I am of the view that the same cannot be resolved at this interlocutory stage and must await the trial of the Plaintiff's claim. The other issue of incorrect valuation report made by the Defendant is now academic in view of my finding that no demand notice was served.

All in all I find that the Plaintiff has shown a *prima facie* case with a probability of success.

On the second condition for the grant of an interlocutory injunction, namely the adequacy of damages as a remedy, the Plaintiff avers in his plaint that the rent collectable from the suit properties is to be used to pay off Kshs 5.62 million borrowed to rehabilitate the suit premises and if the properties are sold the Plaintiff will be faced with multiple suits to which the Plaintiff will have no answer with the consequence that the resultant attachments, imprisonment, embarrassment will not be compensable by damages.

The Defendant's position is that the Plaintiff's loss if the property is sold is compensable by damages. That may very well be the position, but in my view having found that the Defendant is acting contrary to the terms it set in the charge it would be unjust to allow the Defendant to proceed with the intended sale. I will accordingly exercise my discretion in favour of the Plaintiff.

The upshot of the above consideration of the Plaintiff's application dated 9<sup>th</sup> September, 2005 is that the same is allowed in terms of prayer 3 thereof.

The injunction granted is conditional on the Plaintiff filing an undertaking on oath to pay damages if any to the Defendant in the event that it is found at the trial that the injunction ought not to have been issued. The said undertaking to be filed within seven (7) days of today.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2005**

**F. AZANGALALA**

**JUDGE**