

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

Civil Case 635 of 2005

JANE WANJIKU CHEGE.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT

R U L I N G

By chamber summons dated 21st October 2005, the plaintiff has come under OXXXIX Rule 1,2 and 3 of the Civil Procedure Rules.

The plaintiff seeks the following order: -

“That a permanent injunction be issued restraining the defendant, its agents or servant from selling or advertising for sale or in any way disposing of the property known as L.R. Number NRB/BLK 96/134 KARIOBANGI SOUTH situated in Nairobi.”

Before analysing the application, the submissions in support and in opposition, thereof, I wish to state that the prayer sought is not available to the plaintiff. The plaintiff seeks a permanent injunction at an interlocutory stage and under Order 39. That prayer is not available as prayed and on that basis alone the application would be dismissed.

However since the application was fully argued before me I will analyse the arguments.

The application is made on the grounds that, the defendant had not given the plaintiff a statutory notice; that the defendants intention to sell the charged property violated the plaintiff’s right of redemption; that there were no arrears in the plaintiff’s loan account; that the plaintiff will suffer irreparable loss unless the defendant was restrained and that the plaintiff has continued to make timely monthly repayments.

On the first ground the plaintiff, in her supporting affidavit, deponed that to date she has not received a statutory notice. This allegation is denied by the defendant, who in its replying affidavit annexed a copy of the statutory notice dated 17th May 2005 together with the certificate of posting. Confronted with this information, the plaintiff’s counsel argued that the notice was sent to an address, P O Box 67597 Nairobi, yet the plaintiff’s exhibit No. “**JWCI**” the plaintiff’s address is shown to be **P O Box 69197 NAIROBI**. The plaintiff therefore argued that the notice was not received.

The defendant’s counsel relied on section 153 R.L.A. which provides that a notice under that Act is deemed to have been served, if amongst others, it was sent by registered post in last known address of the person.

The finding of the court was that the plaintiff was served with the notice. The plaintiff in her affidavit in support annexed exhibit marked as “**JWCII**”, which were letters sent by the defendant to various auctioneers. That letter was copied to the plaintiff and the plaintiff obviously received the same since she relies on it. The address used on that letter, for the plaintiff is P O Box 67597. That was the same address used by the defendant to send the statutory notice.

On the ground that the defendant’s intention to sell the charged property was violation of the plaintiff’s rights and that sale by private treaty, as the defendant’s intention is, was contrary to section 79

of R.L.A. was met by defendants in the following way; that the defendant had given a three months notice as per section 74 (2) R.L.A.; and the right of sale by private treaty was preserved under the charge.

Indeed under section 77 R.L.A and as provided by paragraph 10 (iii) of the charge the defendant has a right to sell by private contract the charged property. The restrictions seen by the plaintiff under section 79 R.L.A. do not apply to this charge.

The plaintiff failed to show by affidavit or by submissions what irreparable damage she was likely to suffer if sale proceeds. Apart from that observation, the charged property, from the moment the plaintiff charged it to the defendant, became a commodity for sale.

The plaintiff in coming to court and indeed in getting a certification that this matter was urgent and most importantly getting an interim order, from the duty judge, for an injunction, came on the position of non disclosure of material facts. The plaintiff stated that she was not in arrears of her loan account and that she was making timely repayments of her loan. That statement is wholly untrue an examination of the statements of account proves the untruthfulness of that statement. When a party comes to court seeking an injunction there is an obligation to disclose material facts. The plaintiff having indeed failed to make material disclosure, as herein before, the court can discharge the interim injunction obtained on that non-disclosure and further refuse to grant orders, on her application.

Evidently the plaintiff fails to satisfy the requirements for an injunction and because of material non-disclosure the application cannot be granted as prayed.

The order of this court is that the chamber summons dated 21st October 2005 is hereby dismissed with costs to the defendant. For the avoidance of doubt the court does hereby discharge the injunction granted to the plaintiff in this matter on 7th November 2005.

Dated and delivered this 25th day of November 2005.

MARY KASANGO
JUDGE