



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 105 of 2004

RICARDA WANJIRA GUTU PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT

JOSEPH G. MUTURI t/a MUGA AUCTIONEERS

GENERAL MERCHANTS2ND DEFENDANT

RULING

In a Chamber Summons dated 24th February, 2004, brought under Order 39 Rules 1 and/or 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and all other powers and enabling provisions of the Law, the Plaintiff seeks mainly an injunctive order regarding L.R. No. NAIROBI/BLOCK 110/855 i.e. that the Defendants be restrained from dealing in any manner with the said piece of land pending the hearing and determination of this application. The grounds on which the application is premised are:

- (a) That the Defendants have failed to comply with the statutory commands,
- (b) The Defendants are attempting to exercise their statutory power of sale in bad faith as they have failed to provide a statement of accounts having withheld the Plaintiff's benefits,
- (c) The Plaintiff has made out a "prima facie" case with a probability, of success due to the Defendants failure to comply with statutory commands and
- (d) The Defendant's statutory power of the sale had not accrued due to the invalid notices served by the 2nd defendant on behalf of the 1st Defendant.

The application is supported by an affidavit sworn by the Plaintiff herself Ricarda Wanjira Gutu.

The Application is opposed and a replying affidavit was filed by one Kennedy Abuga the Senior Legal Officer of the 1st Defendant. Counsel for the Defendants also filed Grounds of Opposition. The application was argued before me on 10th March 2004. In support of the application Mr. Tindi Counsel for the Plaintiff argued that the notices purportedly served by Respondents were not proper and particularly that the letter dated 16th November 2001 by the 1st Defendant to the Plaintiff is not a statutory notice. Counsel argued that on receipt of the said letter the 1st Defendant and the Plaintiff entered into a scheme of arrangement whereby the Plaintiff was to pay the amount due in installments. In Counsel's view in default

of payment interms of the said scheme of payment the 1st Defendant should have served a fresh statutory notice of sale and not relied on the” letter of 16th November 2001 aforesaid.

It was further argued for the Plaintiff that the 1st Defendant inpurported exercise of its statutory power of sale acted in bad faith asthe Plaintiff's terminal benefits have been withheld by the 1st Defendantand the exercise of the said power of sale was malicious.

On the basis of the above Counsel for the Plaintiff submitted thatthe Plaintiff had shown a "prima facie" case with a probability of success and was entitled to a temporary injunction as no damages wouldcompensate the Plaintiff for the loss that would result if her only asset issold by public auction. The Plaintiff relied on the case of S1M1YU -V-HOUSING FINANCE CO. OF KENYA (2001) 2EA 540 Ringera J.held that no proper statutory notice of sale had been served becausethe post office box number used by the Finance Company did notbelong to the Plaintiff.

Mr. Mukuria Counsel for the Defendants opposed the applicationfor the Defendants. He submitted that the Plaintiff had not satisfied the prerequisites set out in the case of GIELLA -V- CASSMAN BROWNSC CO.LTD (1973) E.A. 358.

Mr. Mukuria further relied on the case of NOORMOHAMED] AN MOHAMMED -V- KASSAMALI VIRJI MADHANI (1953) 29EACA 8.

In this case irreparable injury was described as substantial injurywhich cannot be adequately remedied or atoned for by damages. InCounsel's view ,the Plaintiff had not shown that she would suffer injurythat cannot be compensated by damages since the relationship betweenthe Plaintiff and the 1st Defendant was one of borrower and lender andthe Plaintiff is clearly in default. Even if she disputes the amount owed,this alone would not entitle the Plaintiff to an injunction.

Mr. Mukuria submitted that there is no requirement for morethan one statutory notice of sale. In support of this assertion Counselrelied on the case of GEORGE GIKUBU MBUTHIA -V- JIMBACREDIT FINANCE COPRORATION AND ANOTHER-NAIROBI CANo.111 OF 1986 (unreported). The Court of Appeal at page 9 ofthe judgment said:-

"It is plain that Section 74 did not impose on the chargee, thegiving of more than one notice and there is no sound policyreason why he should be obliged to give fresh notice to thechargor any time a sale was suspended to accommodate him. If such were a legal requirement no charge in the right mind wouldsuspend a projected sale as a matter of favour or indulgence to adefaulting mortgagor."

Counsel for the Defendants submitted that the Plaintiff was givenindulgence for over 3 years. She made many proposals to settle thecharge debt but failed. The last of the proposals was made on 25thJuly, 2002. She failed to honour the proposal. She then came toCourt and obtained an ex-parte order of injunction but failed todisclose that she had been served with a statutory notice of sale earlierand had made repayment proposals which she had failed to honour.Counsel therefore submitted that as the Plaintiff was guilty of non-disclosure of material facts she should not have been granted theequitable remedy of injunction. For this assertion Counsel relied on thecase of TIWI BEACH HOTEL LTD -V- JULIANE ULRIKE STAMM(1990) 2 KAR 189 where it was held that:

"It is the clear duty of an applicant seeking relief from the Courtparticularly on an ex-parte application to make full disclosure ofall the facts material to the application which is known to him orher".

Counsel further submitted that even the balance of conveniencetilts in favour of the Defendants as the balance of the charge debtremains unpaid and interest continues to accrue. Reliance was placedon the case of AIRLAND TOURS AND TRAVEL LTD -V-NATIONAL INDUSTRIAL CREDIT BANK-NAIROBI HCCC NO.1234 OF 2002(unreported). Ringera J. said at page 12 of thisjudgment:

"I would have found that the same (balance of convenience)favoured a refusal of the injunction sought in

view of the fact that the applicant is in considerable and undisputed arrears of mortgage on which interest keeps on accumulating and no repayments are being made. It is not in the interest of either the borrower or the lender to maintain such a status quo." Mr. Mukuria Counsel for the Defendant under the circumstances prayed for dismissal of the Plaintiffs application with costs.

I have considered the application and all the arguments made in support and in opposition to it. The plaintiff had to show that she had a prima facie case with a probability of success at the trial. If she had succeeded in showing this first prerequisite she still had to show that she would suffer an irreparable injury which could not adequately be compensated by way of damages. If there would be doubt as to the existence or otherwise of a prima facie case the application would be considered on a balance of convenience.

Does the Plaintiff have a prima facie case with a probability of success? The Plaintiffs case is predicated on the fact that no statutory notice of sale was served upon her at all. According to her the 1st Defendant's letter dated, 16th November, 2001 was not a statutory notice of sale upon which the 1st Defendant would exercise its statutory power of sale. She argues that after the said letter she negotiated with the 1st Defendant which accepted her proposal to pay the charge debt in installments. In her view once her proposal had been accepted by the 1st Defendant the exercise of the statutory power of sale could only arise again after the issue of a fresh notice. It was the Plaintiff's major argument for seeking the temporary injunction. The Plaintiff is not alleging settlement of the charge debt. The suit filed against the Defendant has nothing to do with her indebtedness to the 1st Defendant which indebtedness she has freely admitted in various correspondence with the 1st Defendant. I find that the 1st Defendant's letter dated 16th November 2001 addressed to the Plaintiff was a valid statutory notice of sale. The Plaintiff did not challenge service of the same. The fact that the 1ST Defendant accepted the repayment proposal made by the Plaintiff did not invalidate the said statutory notice of sale. There is no requirement in law that a charge be served with a fresh statutory notice of sale whenever a sale is suspended. Under section 74(1) and (2) of the Registered Land Act Cap. 300 Laws of Kenya and on the authority of the case of GEORGE GIKUBUMBUTHIA -V- JIMBA CREDIT FINANCE CORPORATION AND ANOTHER (supra) 1 hold that the Plaintiff was served with a valid statutory notice of sale. I am therefore not satisfied that the Plaintiff has shown that she has a prima facie case with a probability of success. This being my view I do not have to decide whether or not the Plaintiff would suffer an irreparable injury which cannot adequately be compensated by damages. I am also not in doubt that the Plaintiff has not shown a prima facie. I therefore do not have to decide where the balance of convenience tilts.

The Defendants have complained that the Plaintiff was guilty of material non-disclosure when she obtained an ex-parte order of injunction. An injunction is an equitable remedy and he who comes to equity must come with clean hands. When the Plaintiff first came to Court and obtained an interim order of injunction she did not disclose that she had been served with the Defendant's letter of 16th November, 2001. She did not also mention that she had not honoured previous proposals made to the 1st Defendant. It would therefore have been inequitable to maintain in force an interlocutory injunction obtained where there was such non-disclosure of material facts.

In the result, the Plaintiffs application dated and filed on 24th

February 2004 is dismissed with costs.

Dated and delivered at Nairobi this 30th day of April, 2004.

F. AZANGALALA

AG JUDGE