IN THE REPUBLIC OF KENYA

HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURTS NAIROBI

CIVIL SUIT NO 302 OF 2002

THATHY…….....……PLAINTIFF

VERSUS

EASTERN KENYA AUCTIONEERS…….DEFENDANT

MIDDLE EAST BANK KENYA LTD…….DEFENDANT

RULING

The plaintiff seeks an interlocutory injunction to restrain Middle East Bank Kenya Ltd, the 1st defendant herein, from advertising for sale, selling, alienating, auctioning or in any other way interfering with the plaintiff's ownership or possession of the property known as L.R. No.7785/87 Runda Drive, Nairobi until the suit he has filed is heard and determined. The application was filed simultaneously with the plaint originating the action on 11.3.2002. The property in question is sought to be sold by the bank in the exercise of its statutory power of sale under the provisions of Section 69 of the TPA.

The plaintiff's case is that the intended sale of his property is in breach of the law on three grounds. First, he has not been served with the statutory three months notice contrary to Section 69 A(1) of the TPA; secondly, the property is sought to be sold without there being a valuation thereof contrary to the Auctioneers Rules, and thirdly, he has not been served with any or any valid notification of sale contrary to the Auctioneers Rules. The plaintiff also protests that he has not been furnished with a statement of his account with the Bank. In support of the application, there are affidavits sworn by Vandana Thathy, who describes himself as the duly appointed Attorney of the plaintiff, sworn on 11th and 26th days of March, 2002.

The Bank has entered appearance and filed a defence. In so far as they may be material to the grounds on which the injunction is sought, the Bank has pleaded that the plaintiff has been furnished with statements of his account and is fully aware of his liability to the Bank, it is denied that a statutory notice has not been served and, in the alternative, that the plaintiff has failed to pay interest which is in arrears for a period exceeding two months and is also in breach of his other obligations under the charge over the suit premises. It is also pleaded that a valuation of the suit premises though not required has been done and that notifications of sale have been duly given to the plaintiff. In opposition to the application for injunction, there are affidavits sworn by Saya Dinamani, the Bank's Managing Director, and by Borkatte Pai, the Bank's General-Manager. Both are sworn on 18th March, 2002. There is also an affidavit by Josphat Mutua, the auctioneer, sworn on 2.4.2002.

On the statutory notices, the plaintiff's advocate argues that the two notices annexed to the affidavit of Saya Dinamani of 18.3.02 as part of annexture "A" and dated 5.10.98 and 18.1.99 respectively are invalid

in that they do not give the mortgagor a period of three months within which to pay the mortgage debt as required by Section 69 (A) (a) of TPA. He also argues that although both of them indicate they were sent by registered post, there is no certificate of posting or other evidence to prove that they were indeed sent by registered post. He also criticizes the notice dated 6.9.2001 annexed to the affidavit of Borkatte Pai for failure to comply with section 69 (A) (a) of TPA in that it does not give a period of 3 months within which to pay the mortgage or in default the mortgaged property would be sold. Reliance is placed on the case of *Trust Bank Ltd v Pros Chemists Limited & another* [Civil Appeal No.133 of 1999]. Service of this notice which Mr. Pai depones to have personally served on the plaintiff in his (Mr. Pai's office) is also denied by the plaintiff.

On valuation, the plaintiff's case is that rule 11(1) (b) (x) of the Auctioneers Rules 1997 require that the property to be auctioned should have been valued within the last 12 months preceding the auction sale. In the instant case, he points out that according to the letter dated 20.2.2002 addressed to the Bank by Teja S. Kundhi, a registered valuer, the last valuation was done in May 1995 and that such valuation is not even annexed.

On notifications of sale, the plaintiff faults the one dated 28.5.01 on the grounds that it was issued prior to the last statutory notice of 6.9.01 and on the basis that it was served on a house girl whose relationship to the plaintiff is not disclosed. It is also said to be defective for the additional reasons that it does not indicate the value of the property or the reserve price thereof contrary to rule 15(b) of the Auctioneers Rules, 1997. Reliance is placed on the case of *Lalchand Shah & another v The Central Bank of Kenya appointed Manager of Reliance Bank Limited* [HCCC No 769 of 1999] in which Mbaluto, J. held that a notification of sale which failed to comply with the Auctioneer's Rules in that it omitted to state the value of the property to be auctioned or to give the owner of the property adequate notice prior to the conduct of the sale was an invalid notice and could not constitute the basis of the legal sale of the mortgaged property. The plaintiff's advocate also faulted the notification of sale dated 11.12.01 on several grounds. He argued that it did not contain the value of the property or the reserved price thereof. He further argued that the same was not served on the plaintiff but on an Asian lady whose name or relationship to the plaintiff is not disclosed. He also contended that if it was also served by being affixed to the property as deponed in paragraph 5 of Mr. Mutua's affidavit, it was affixed on the wrong property as Mr. Mutua has described the plaintiff's property as L.R. No.7785 of 1987 whereas the plaintiff's property is L.R. No.7785/87. Counsel further pointed out that the auctioneer has not filed any certificate of service as required by rule 15(c) of the Auctioneer's Rules in cases where the person served fails to acknowledge service. He also pointed out that the signature on the notification against the alleged refusal by the Asian lady to acknowledge service is not that of Mr. Mutua.

On accounts, counsel for the plaintiff argued that from the annextures to the affidavit of Mr. Dinamani sworn on 18.3.2002, it was evident that the applicant had paid almost the entire principal amount and the problem was with high interest rates which had been imposed without the plaintiff's consent or knowledge. He relied on the case of *Harilal & Co & another v The Standard Bank Ltd* [1967] EA 512 where it was held that a bank could not in reliance of a trade usage vary the charges it imposed on its customer without the prior consent of the customer to the variation and that any such usage would have no effect in the law because it was contrary to the law of contract, unreasonable, oppressive and unjust.

For all those reasons, the plaintiff's advocate submitted that the plaintiff had shown a *prima facie* case capable of succeeding at the trial and accordingly the interlocutory injunction should be granted.

The defendant's response was that it had given a statutory notice even though it was not obliged to give the said notice as it placed reliance on the facts that interest on the mortgage was in arrears for a period exceeding two months (a fact which was not denied by the plaintiff) and the plaintiff had failed to insure the property in contravention of his covenant under the mortgage. Those two facts brought the matter within the ambit of Section 69(A) (b) and (c) of the TPA and it was not necessary to serve the plaintiff with any statutory notice. Reliance was placed on the case of *James Ombere Okotch v East African Building Society* [Civil Appeal No.202 of 1996].

The defendant's advocate further argued that under Section 69 (1) of the TPA the defendant was at liberty

to exercise its power of sale by either private treaty or public auction and need not do so through a licensed auctioneer unlike under the Registered Land Act, Cap.300, where charged property can only be realized through a licensed auctioneer. He submitted that the Auctioneers Rules were irrelevant in the context of a sale under the TPA. He also submitted that non compliance with the Auctioneers Rules was not fatal and it could not derogate from a statutory power. Reliance was placed on the cases of *David Ngugi Mbuthia v Kenya Commercial Bank Ltd & another* [HCCC No 304 of 2001] and *Kanorero River Farm River Farm Ltd & 3 others v National Bank of Kenya* [HCCC No 699 of 2001].

The defendant's advocate also submitted that the affidavits in support of the application were sworn by the plaintiff's attorney who had no personal knowledge of the matters. Last, but not least, it was pointed out on behalf of the defendant that from the affidavit of Saya Dinamani in opposition to the application, it was evident that numerous demands for payment and promises by the plaintiff to pay had been made.

In reply to the submissions made on behalf of the defendant, the plaintiff's advocate argued that there was a power of Attorney to Mr. Vandana Thathy and he could sue and swear affidavits on behalf of the plaintiff. It was also argued that once the defendant chose to realize its security by way of service of a statutory notice under Section 69 (A) (a) of TPA; he is bound to comply with all the rules pertinent to such a notice. In similar vein, it was submitted if he opts to sell the property by way of a public auction through an auctioneer, he must follow the Auctioneers Rules. The cases of *David Ngugi Mbuthia* and *Kanorero River Farm* were distinguished on the basis that the securities in contention had been sold by the time interlocutory injunctions were sought.

I have now to weigh the above submissions in the light of the settled principles for the grant of interlocutory injunctive relief. Those principles are as follows. First, the applicant must show a *prima facie* case with a probability of success at the trial. If the court is in doubt about the existence or otherwise of a *prima facie* case it should decide the application on a balance of convenience. Secondly, a court will not normally grant an interlocutory injunction unless it can be shown that the applicant is likely to suffer an injury which cannot adequately be compensated in damages: see *Giella v Cassman Brown & Co Ltd* [1973] EA 358. Those two are, if I may so say, the necessary but not the sufficient conditions for grant of interlocutory injunctive relief. Of equal importance is this: an injunction is an equitable remedy and the court may decline to grant the same if it is shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity. And of course it has to be remembered that at the interlocutory stage the court is not called upon to make (indeed it is forbidden from making) definite findings of fact (particularly on contradictory affidavit evidence) or conclusions of law.

Approaching this matter that way, I first ask whether the plaintiff has shown a *prima facie* case with a probability of success. In that regard it is evident from the plaint that the case the plaintiff has to make out at the trial is that the intended sale of the mortgaged property is unlawful for want of service on himself of a valid statutory notice under the TPA and a valid notification of sale under the Auctioneers Rules and also for the defendant's failure to furnish him with statements of account. From the submissions made before me, the trial court will be called upon to pronounce on whether in the circumstances of this case the defendant could realize the security without strict compliance with the requirements as to service of a valid statutory notice and auctioneers notification of sale. In that regard I agree with the submissions on behalf of the defendant that a mortgagee exercising his power of sale pursuant to the provisions of Section 69 (1) of the TPA may do so by private treaty or public auction. The choice is his. I also agree that if the power of sale is intended to be exercised on the basis that some interest under the mortgages is in arrear and unpaid for two months and/or that the mortgagor is in breach of his obligations under the mortgage or under the TPA other than the payment of mortgage money or interest thereon it is not necessary to give any notice as none is required by the provisions of Section 69 A (b) and (c) of the said Act.

However, and here I agree with the submissions on behalf of the plaintiff, if the mortgagee despite the existence of the conditions specified in paragraph (b) and (c) chooses to proceed to exercise its statutory power of sale by invoking the machinery of a notice under paragraph (a) of the same section, he is obliged to comply strictly with the requirements of that paragraph. And in similar vein, if the mortgagee opts to sell the mortgaged property by public auction through a licensed auctioneer, the Auctioneers Rules, 1997 become relevant and applicable.

So the key issue here is whether or not the Bank opted to exercise its power of sale by the route of a notice under paragraph (a) and by way of a public auction through a licensed auctioneer. In that regard when I consider the notices exhibited to the affidavits of Mr. Dinamani and Mr. Pai which counsel for the plaintiff referred to, the following facts emerge. The notice of 5.10.98 is headed statutory notice. The tenor and content thereof suggest that the Bank is exercising its statutory power of sale because a sum of Kshs.5,048,054.71 inclusive of interest on arrears which has been outstanding for more than 3 months is outstanding and due from the mortgagor. The content of the notice as a whole appears to me to show that the Bank is treating this as the statutory notice required under paragraph (a) of section 69 A. The same may fairly be said of the notification dated 18.1.99. And the third notice which is dated 6.9.01 is clearly a notice intended to pass as the statutory notice under the provision of law, save for the Bank's purported reservation of its right to exercise the power of sale without even giving the said notice. All the above facts incline me to the view that the Bank has opted to exercise its statutory power of sale on the basis of a notice issued under paragraph (a) of Section 69 A and not on the basis of there being interest in arrears for two months or the mortgagor's breach of any covenant in the charge even though both conditions have existed. That being so I am persuaded that the Bank should not have its cake and eat it as it seeks to do by purporting to rely on what it must have considered as valid statutory notices and in the same breath resiling from reliance thereon on the basis that other conditions which made it unnecessary to give the notice also exist. Its case on this aspect of the matter must, as things stand, be judged on whether or not it served the plaintiff with the required notice under Section 69 A (a). In that regard I agree with the submissions on behalf of the plaintiff that the notices of 5.10.98 and 18.1.99 cannot pass muster. They do not specify that the security would be realized if the mortgagor does not make payment of the charge debt demanded within 3 months after his receipt thereof. That leaves only the notice dated 6.9.01. Although the plaintiff's advocate characterized this notice as defective, I am unable to see any defect in it. It perfectly accords with the requirements of Section 69 A (a). The only issue about it is whether it was served on the plaintiff. In that connection, Mr. Pai, the Bank's General Manager has deponed in his affidavit of 18.3.02 that he personally served the said notice together with statements of account on the plaintiff himself on 6.9.01 when the plaintiff called on him pursuant to an appointment made the previous day. That alleged service is denied in the further affidavit of Vandana Thathy, the plaintiff's lawful Attorney sworn on 26.3.02. In view of the affirmation and denial of service of the notice, I cannot make a definitive finding on the issue at this stage without being accused of deciding the matter on contradictory affidavit evidence. So the position must be that it cannot be said the statutory notice was not served. Nor can it be said to have been served.

As regard the service of the notification of sale, I have already expressed the view that once the mortgagee opts to exercise the power of sale through a licensed auctioneer in a public auction, the Auctioneers Rules become relevant and applicable. Accordingly a valid notification of sale should be served on the mortgagor. In that connection, I think the notification which should tax the court's mind is the one allegedly served after the last statutory notice. That would be the notice issued on 11.12.01 annexed to the affidavit of Josphat Mutua, the Auctioneer. From Mr.Mutua's own affidavit the notification was served in two ways. It was affixed on the main door of the mortgaged property and it was also left with an Asian lady in a house near Pangani Police Station where the plaintiff lived according to the auctioneer's information. The plaintiff's advocate scoffed at the first mode of service by pointing out that because the notice was affixed on the house on LR No.7785 of 87 and not LR No.7785/87 (which is the correct description of the plaintiff's property) it must have been affixed on the wrong house. That to me is not a serious argument. The advocate is making a mountain out of a molehill. There is no doubt that the auctioneer was only guilty of a minor misdescription but otherwise he is adverting to one and the same mortgaged property. The second mode of service is attacked on more substantial ground, namely that the relationship of the Asian lady allegedly served with the notice with the plaintiff is not disclosed. Rule 15 (c) requires the notice to be served either on the registered owner of the property or an adult member of his family residing or working with him. In the instant matter, it is not clear whether or not the lady served was a member of the plaintiff's family. She may or she may not be. Two conclusions may in my view be properly drawn from the above facts. One, the first mode of service is not recognised by the Auctioneers Rules, 1997. Two, on the auctioneer's own affidavit, there is doubt whether or not the notification of sale was served on the plaintiff as required by rule 15 (c). Counsel for the bank argued that non compliance with the Auctioneers Rules cannot derogate from an otherwise lawful exercise of a statutory power. The plaintiff's advocate for his part drew a distinction between situations where a

security has been realized in contravention of the Auctioneers Rules and situations where it is sought to restrain the exercise of the power of sale which is manifestly in violation of the Auctioneers Rules. I accept that distinction myself. It appears to stand to reason and to be in conformity with both the provisions of Section 26 of the Auctioneers Act and Section 69 B 1 (2) of the TPA to hold that anybody who suffers injury or loss as a result of the wrongful or improper exercise of the powers of an auctioneer or the power of sale generally has his remedy in damages only. However, it is a non sequitor to suggest that one who is about to be damnified by such an improper or irregular exercise of either the powers of an auctioneer or the general power of sale isn't entitled to stop the intended injury on its tracks particularly where the intended breach is a serious one.

As regards the complaint that the intended sale is unlawful because the property has not been valued as required by the Auctioneers Rules, all I would say is that rule 11(1)(b) X requires the letter of instructions to indicate the reserve price of the land based on a professional valuation carried out not more than 12 months prior to the proposed sale. There is no requirement that the reserve price be indicated on the notification of sale as contended by the plaintiff's advocate.

As regards the furnishing of a statement of account to the plaintiff, I don't think much would turn on it at this stage. In view of the fact that the plaintiff's substantial indebtedness to the bank is not disputed, a statement of account would at most only raise issues about the exact amount owed. Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injuncting the mortgagee from exercising his statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff's attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed.

To summarise the foregoing, this is a case where the service of a statutory notice under the TPA and the notification of sale under the Auctioneers Rules is *prima facie* neither proved nor disproved. I cannot in those circumstances say the plaintiff has or has not made out a *prima facie* case with a probability of success at the trial. I think the application falls to be decided on a balance of convenience. I intend to weigh that balance after considering the other conditions and factors that bear on whether or not to grant the injunction prayed for.

I now turn to a consideration of the other conditions for the grant of an interlocutory injunction. Is the plaintiff likely to suffer an irreparable harm which cannot adequately be compensated in damages if the injunction sought is not granted? In paragraph 21 of his affidavit in support of the application, the plaintiff's Attorney depones that unless the defendant is restrained as prayed the plaintiff will suffer irreparable harm. On the other hand, in ground 5 of the grounds of opposition filed by the defendant the defendant's advocates contends that the plaintiff can be compensated in damages. The compessability or otherwise in damages as a condition for the grant of an interlocutory injunction is an old one which is firmly rooted in the history of an injunction as an equitable remedy. In the matter at hand, the property sought to be sold is a residential house which the plaintiff leases out for economic gain. Its value is easily ascertainable. It has been mortgaged to the bank with full knowledge that if the mortgage debt is not paid as covenanted in the contract, the same would be sold. In those circumstances, it does not lie in the mouth of the mortgagor to say that if he is in default, as he undoubtedly is, the sale of the security would result in irreparable harm to him. In my opinion, his loss is perfectly capable of being compensated in damages and it has not even been suggested by his advocate that the defendant Bank is incapable of so compensating him. The plaintiff does not therefore surmount this hurdle.

How about the plaintiff's conduct? It is apparent from the affidavit of Saya Dinamani of 18.3.02 and the annextures thereto that the history of the parties is characterized by several demands for payment of mortgage debt, and several unfulfilled promises by the plaintiff to pay the said debt. The defendant has extended a lot of indulgence to the plaintiff but the plaintiff has not made good his promises. And from the statement of loan account annexed to the said affidavit it appears that the repayments have been irregular and far between. The last substantial payment was for Kshs.702,000 on 17.8.00. Nothing except a paltry sum of Kshs.4,139.84 has been paid since then. The amount standing unpaid as at 12.03.02 is Kshs.8,208,096.31. In that connection it is significant that although the plaintiff's Attorney filed a further affidavit on 26.3.02 to respond to Mr. Dinamana's affidavit of 18.3.02, there is a no denial in the said

affidavit of the plaintiff's previous promises or of the contents of the aforesaid statement of loan account. And the plaintiff is absolutely silent about repayment. In my judgement, when all the above factors are considered the conclusion is inescapable that the plaintiff's conduct disentitles him to the favour of equity. He cannot get an injunction to restrain the Bank from realizing its security when he is heavily indebted, his promises of repayment have come to nought and he does not evince any intention to repay soon or at all.

As regards the balance of convenience, I think the same tilts infavour of refusing the injunction. The plaintiff is not repaying his mortgage debt. From the statement of account a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo the charge debt will be more than the value of the security quite soon. In those circumstances, neither the debtor nor the borrower stands to gain anything by maintenance of the status quo. The Bank would loose because its security will in effect be no security at all if on sale it cannot realize the debt. And the plaintiff will loose because if the property is ultimately sold, he will not benefit from his investment. A sale of the security now appears to me to be in the best interest of both parties.

The upshot is that the plaintiff's application for an interlocutory injunction is dismissed with costs to the first defendant Bank.

DATED at this Nairobi this 30th day of April 2002

A.G RINGERA

JUDGE