



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 176 OF 2002**

**OOKO.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD .....DEFENDANT**

**RULING**

This is an application by the plaintiff for an order of interlocutory injunction to restrain the defendant from selling her properties known as LR. Nos. Nairobi/Block/111/921 Komarock Estate and Ngong/Ngong 14257 Kajiado District. The said properties are charged to the defendant to secure financial accommodation extended to the plaintiff. In support of the application are a supporting and a supplementary affidavit of the plaintiff herself sworn on 13th February and the 14th of March 2002 respectively. In opposition to the application is a replying affidavit sworn by Timothy Sati, an analyst in the Debt Recovery Unit of the defendant, on 26.2.2002.

The application was canvassed at length before me on the 24th April 2002. The application was made on the grounds that at no time prior to the notification of sale had the defendant issued the relevant statutory notice under section 74 of the Registered Land Act (R.L.A.); that consequently the sale and the sale process is illegal, unlawful, null and void *ab initio*; that the defendant is acting *mala fides*; that the plaintiff has a reasonable cause of action against the defendant with a *prima facie* case with a probability of success; and that the plaintiff's case will be rendered nugatory and the plaintiff will suffer irreparable loss and damage unless the defendant is so restrained.

From the submissions addressed to me the salient points may be summarized as follows. The power of sale was not exercisable as the defendant had not served the plaintiff with the necessary statutory notices under Section 74 of R.L.A. That is so because the statutory notices marked "TS 6" annexed to the replying affidavit of the defendant were addressed to the plaintiff through P.O. Box 78 Homa Bay, which address the plaintiff had never used and whose registered owner she does not know. The plaintiff has deponed that her address was P.O. Box 70801 Nairobi which is the address shown on both the advertisement for sale and the notification of sale. The plaintiff also points out that it is the address which has in the past been used in correspondence between herself and the defendant as shown by the bundle of exhibits known as "MAO 3" annexed to her supporting affidavit and in particular the letter dated 22.9.2002 addressed to the defendant's Debt Recovery Unit in which she complained that the defendant has not been writing to her through the address she has provided.

The defendant's response to the above matter is that post office Box 78 Homa Bay is the plaintiff's last known address as it was the address used by her when she sought employment with the defendant company. The defendant also argued that the letter sent through post office Box 78 Homa Bay was not returned undelivered, that her letter of voluntary early retirement was sent through the same address in June 1998 and that the letters dated 26th and 29th May 2000 which were addressed to her through the same address were obviously received by her as evidenced by the fact of their being annexed to her supporting affidavit as part of exhibit "MAO 3".

The plaintiff also complains about the interest charged by the defendant. She protests that the defendant has charged commercial rates of interest instead of staff rates contrary to the contract of employment between the two of them. It is also argued that the interest charged does not accord with the Central Bank of Kenya (Amendment) Act, No. 4 of 2000 and that in any case, the defendant could not vary the rate of interest charged without registering a deed of variation as provided by Section 71 of the R.L.A. The

defendant's response on interest is that clause 2 of the instrument of charge left the determination of interest at the discretion of the defendant and that the staff rate of 3% per annum was to be applied subject to the plaintiff meeting such conditions as signing fresh standing orders and replying the medical benefits and personal accident insurance cover upon voluntary retirement, which she did not meet, It was also submitted that the Central Bank of Kenya (Amendment) Act, 2000 was not in force as it did not have a commencement date. It was also contended that the dispute as to the amount is not a ground for injunction.

On the adequacy of damages as a remedy, it was argued on behalf of the plaintiff that once the first condition for the grant of an interlocutory injunction had been satisfied, there was no necessity to delve into the other principles. It was also contended that the defendant had not in any case demonstrated that it can adequately compensate the plaintiff.

I have considered the application and the above submissions. The first condition for the grant of an interlocutory injunction is that the applicant must show a *prima facie* case with a probability of success at the trial. If the court is in doubt, it should decide the application on a balance of convenience. The case that the plaintiff will be required to prove at the trial is that the defendant's intended sale of her property is unlawful, null and void. Has she established a *prima facie* case to that effect? It is common ground that the plaintiff is indebted to the defendant. Of the sum of about Kshs.800,000/= borrowed, only about Kshs.400,000/= has been repaid. On the facts there is default in payment. The defendant is therefore entitled to realise its security provided it has given the plaintiff the requisite notice under section 74 of the R.L.A. whether such a notice has been given will be the substantial issue at the trial. At this stage I am not required to determine it with finality. Bearing that in mind, when I consider the evidence and submissions made before me I think it is more probable than not that the plaintiff was served with statutory notice. This is because her denial of ever using post office Box number 78 Homa Bay is not supported by other facts on record. In particular, she has not denied that it is the address she used when she sought employment with the defendant as asserted by the defendant in its replying affidavit and, even more important, it is evident that she has previously received correspondence addressed to her through that address as proved by some of the letters annexed to her own affidavit. As counsel for the defendant submitted, it is unlikely that the defendant did receive letters sent to her in May 2000 but did not receive the notices sent in December, 2000 through the same address and particularly when the said letters were not returned undelivered. As regards the plaintiff's Nairobi address, it would appear from both "MAO 2" and "MAO 3" that that address became known to the defendant in year 2001. As regards the notifications of sale the plaintiff does not deny having been served with the same. So on the whole, I incline to the *prima facie* view that the plaintiff was served with the requisite statutory notices.

On the issue of interest, it may or it may not be the case that the defendant was not entitled to charge the plaintiff more than the staff rate. And it may or may not be the case that the Central Bank of Kenya (Amendment) Act, 2000 is in force and the defendant has charged a higher rate of interest than that prescribed. These are all matters of substantive argument at the trial. For now, all I can say is that even if the plaintiff is right, all that would be established is that she owes less than the defendant has demanded. It would not, or at any rate it was not suggested it would, negative the debt. Accordingly one would be confronted with the long established principle that a dispute as to the amount due is not a ground for injunctioning the mortgagee from exercising its power of sale.

Having taken the above view of the matter I am constrained to find that the plaintiff has not established a *prima facie* case with a probability of success at the trial. She does not therefore meet the very first condition for the grant of an interlocutory injunction.

The second condition is that an interlocutory injunction will not normally be granted unless the applicant can show that he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the applicant to do that. In the instant matter, the plaintiff did not even attempt to do so. She was content to submit that once a *prima facie* case had been made, it was not necessary to consider any other matters and that the defendant had not shown it could compensate her adequately in damages. To my mind, the plaintiff's submission was misconceived. The correct approach to the matter would have been for the applicant to show that she could not adequately be compensated in damages and

that even if damages were an adequate remedy, the defendant could not meet the required amount. In the instant matter the applicant has not established any of the above matters. On the contrary, there is nothing to suggest that if the properties charged were sold and the plaintiff were to prevail at the trial the defendant which is as a matter of common notoriety of which judicial notice may be taken one of the Kenya's largest and most profitable Banks could not meet any award of damages. The plaintiff does not in the premises satisfy the second condition for grant of the temporary injunction.

The upshot is that the application for injunction is dismissed with costs to the defendant.

**Dated and delivered at Nairobi this 24th day of May, 2002**

**A.G RINGERA**

**JUDGE**