



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 1480 OF 2001

LIVINGSTONE MWANGI GICHORA.....APPLICANT

VERSUS

FAMILY FINANCE BUILDING SOCIETY.....RESPONDENT

RULING

By a chamber summons dated 20th September, 2001 the applicant seeks 4 substantive orders:

- (1) An injunction restraining the defendants, its servants or agents from further advertising for sale, selling by public auction or private treaty all that property situate in Nairobi and known as LR No NAIROBI/BLOCK 73/269 together with the buildings and/or improvements thereon pending the inter-parties hearing and determination of the suit.
- (2) The defendant be compelled to render to the plaintiff a true and complete account in writing commencing 2nd September 1996 to date in respect of the facility granted.
- (3) The defendant be compelled to immediately and unconditionally execute a discharge of charge of the suit property and to deliver up the title document to the plaintiff.
- (4) Costs.

The application is based on the grounds:

- (a) That the transactions subject matter of this suit is tainted by fraud, illegality, duress and undue influence, breach of mandatory statutory provisions as particularized in the annexed plaint which form the basis of this suit and the instant application. (
- b) That the defendant has through M/S Muibau Agencies Auctioneers advertised the suit property for sale which sale is scheduled for 5th October 2001.
- (c) That unless the orders of interim injunction sought in the application filed herewith are granted forthwith, the instant application and the suit herein shall be rendered nugatory and in the result the plaintiffs shall suffer irreparable loss and injury.
- (d) That no or no sufficient notice has been issued to the plaintiffs as required by the mandatory provisions of the statutes particularized in the plaint annexed hereto.
- (e) That the defendant has unlawfully and illegally clogged and/or fettered the plaintiffs right of redemption.
- (f) That the alleged advances were made without any consideration and as such cannot precipitate any or any statutory power of sale.
- (g) The grounds contained in the annexed plaint filed herewith.

The application is predicated upon the annexed affidavit of one Livingstone Mwangi Gichora sworn on

the 26th September 2002. For the applicant, it was argued that no valid statutory power of sale has been served upon the applicant, as envisaged by section 74(1) of Registered Land Act (Cap 300 Laws of Kenya). That the time frame is three months within the date of that letter as opposed to 3 months from the date of that letter as enjoined by the aforesaid section. In this regard I was referred to annexure "LMG6" on evidence and *Trust Bank Ltd vs George Ongaya Okoth*: Court of Appeal at Nairobi: Civil Appeal No 177 of 1998 [unreported] on law. On the basis of that authority counsel argued that notice served upon the chargor should be effective 90 days after date of service. No evidence of service is available hence there is no evidence when 90 days would commence.

It is further argued for the applicant, that in any event there is no valid valuation report for a period of one (1) as required by rule 11 of the Auctioneers Rules 1997.

It was also argued for the applicant, that the term of the charge does not comply with the letter of offer exhibit "LMG3". The security was for shs 500,000/- while the charge was drawn and registered for only shs 300,000/-. The charge, counsel argued, was at variance with the letter of offer. On the basis of the foregoing counsel for the applicant contended, that the applicant had thereby met the principles of granting injunction as enunciated in the celebrated case of *Anniello Giella vs Cassam Brown & Co Ltd* [1973] EA page 358.

The respondent relied on grounds of opposition dated 3rd day of October 2001 and a replying affidavit of one Harun Njuguna sworn on the same day.

For the respondent it was argued that a valid notice under section 74 of the Registered Land Act was issued and served upon the applicant in accordance with the law.

It was further argued that this difference between the figures as regards the amount in the charge document and the letter of offer does not hold any water in view of paragraph 17 of the replying affidavit of Harun Njuguna aforesaid. The respondent wrote off shs 200,000 to the benefit of the applicant. Interest was merely being charged on the sum of shs 300,000/-. In the circumstances the applicant has come to court with soiled hands and is guilty of material non-disclosure. The applicant is therefore not deserving of an equitable remedy of an injunction.

It was also argued for the respondent that the account was joint between James Ngaruiya, the son, and Gibson Gichora Githaiga. In the transaction James Ngaruiya was acting as guarantor to Gibson Gichora Githaiga. In foregoing circumstances the statement of accounts would indicate any of the two names hence there is no fraud. In this regard I was referred to Court of Appeal Civil Case No. 251/96 *Robert Kabagendi Otachi vs Housing Finance Of Kenya Ltd* [unreported] where at page 6 their Lordships had this to say:

"According to *Halsbury's Laws of England*, Fourth Edition, Vol 32 para 725: The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court".

I have carefully gone through the pleadings, the application and various affidavits filed in support of and in opposition and considered all the authorities cited before me and others known to me.

On the evidence it appears to me that the request was for a loan of shs 500,000/-. Security offered was LR No NRB/BLOCK 73/369. Repayment was at the rate of 36 monthly instalments of shs 30,000/-. The loan was disbursed in two stages: shs 300,000/- and shs 200,000, respectively.

The first charge of shs 300,000/- was made between Gibson Gichora Githaiga the father of James Ngaruiya. It came to pass that Gibson Gichora Githaiga passed away on 5th January, 1999 as per exhibit "LMG2". The loan was secured by property aforesaid which was in the name of the deceased as per exhibit "LGM1". Two accounts were opened:

1) Account No 506-514-211-1000 in the name of Washington James Ngaruiya (Joint)

2) Account No 506-514-1000 in the name of Gibson Gichora Githaiga (deceased) see exhibit "LGM5".

It would further appear from exhibits LGM5 that upon the death of Gibson Gichora Githaiga in 1999 Family Finance Building Society continued operating the two accounts as if both the account holders were still alive. The account according to exhibit "LGM5" aforesaid was active in the year 2000 – 2001 notwithstanding the death of one of the joint account holders with the consequence that as at 30th January 2001 it had a debit balance of shs 1,004,939/50 as per the statutory notice dated 30th January, 2001. This in my view constitutes gross violation of the law.

It is trite law that account of a deceased person cannot be drawn upon or the money transferred until probate or letters of administration have been granted and registered with the Banker. See *Halsbury Laws of England* 4th Edition vol 3. According to the available evidence the loan was granted to Mr Gibson Gichora Githaiga on the basis of security registered in his name as aforesaid. The loan account was opened in his own name and by notice of his death on 5th January 2002 the Bank was not under any duty to allow a third party to with Mr Washington James Ngaruiya to draw on the said account. On that ground alone I would have granted the orders sought pending hearing of the suit.

The foregoing apart, the applicant also raised the issue of notices. The applicant urged me to find that the notice given did not comply within section 74(1) of the Registered Land Act which provides.

"74.(1) If default is made in payment of the principal sum or if any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be".

According to counsel for the applicant the notice served upon the chargor should be effective 90 days after the date of service not from the date of issue. It was the applicant's case that before a chargee can exercise his/ her/its right of sale the chargee must serve by registered post, the relevant statutory notice. Three months after the chargor's receiving such notices the Bank's power of sale arises.

In the instance case there is no evidence of the date of service. In the Court of Appeal Civil Appeal No 145 of 1995 *Nyagilo Ochieng & Another vs Fanuel B Ochieng & 2 Others* [unreported] their Lordships observed at page 4 that:

"Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.....it would have been a very simple exercise for the Bank to produce a slip or slips showing proof of posting of the registered letter or letters containing the statutory notice or notices..... In the absence of proof of posting we are constrained to hold that the sale by auction was void".

Section 74(1) fixes the commencement date of the notice. The notice runs from the date of service of the notice on the chargor. The date of the notice is immaterial. From the evidence on record the date of service is lacking and hence the date when the 90 days is supposed to start running is unknown. In those circumstances I agree with counsel for the applicant that there is no evidence that a valid statutory notice has been served on the applicant as by law enjoined.

Quite apart from the foregoing rule 11 of the Auctioneers Rules 1997 provides:

11. (1) A court warrant or letter of instruction shall include, in the case of

(b) immovable property
(i) as in (i) to (v) in paragraph (a);

- (ii) the land reference number, file number, plot number or file number, as the case may be.
- (iii) the area in hectares or in square metres;
- (iv) the user and any restrictions by statute or otherwise on the disposition of the property or any interest in it.
- (v) the tenure and in the case of leasehold, particulars of the landlord and the annual land rent.
- (vi) The location, and in the case of land situated within a township or municipality, the amount of the most recently available annual site value tax;
- (vii) On accurate description of improvements and developments
- (viii) The names, and addresses of encumbrances on the title together with (aa) the estimated amount due to any encumbrancer; and (bb) the estimated amount of arrears of land rent rates and taxes;
- (ix) the names addresses and titles of any persons in possession of the property to be sold or any part of it;
- (x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

(2) The letter of instruction shall be in the Sale Form 1 out in the Appendix.

Rule 11(1) (x) requires that a valuation be undertaken the year before the sale. There is no proof that valuation was undertaken within the aforesaid period and therefore the sale contravened the aforesaid rule. These rules are not directory but mandatory and non compliance with the same renders the proposed sale null and void.

As I have endeavoured to show there are a host of omissions that renders the proposed sale untenable in law. For those reasons the application dated 26th September 2001 by way of Chamber Summons thereby succeeds.

Accordingly there shall be an injunction until the hearing and determination of the suit. Costs shall be in the cause. Liberty to apply to both parties.

Dated and delivered at Nairobi this 31st day of July, 2002

N.R.O. OMBIJA

JUDGE