

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 350 OF 2002

PETER DAUDI MBOGORI PLAINTIFF

- Versus -

1. NATIONAL BANK OF KENYA LTD.

2. GARAM INVESTMENT DEFENDANTS

R U L I N G

The Plaintiff filed a suit on 29/8/2002 and on the same day filed an application under certificate of urgency to restrain the Defendants from auctioning his property being Plot No. 2895/2/3 Timau in Meru area of the Republic of Kenya. The auction was stopped under a court order on ex parte basis. The application came up for hearing inter partes today.

There are undisputed facts disclosed and admitted in the plaint. The Plaintiff has created a charge on the said property in favour of the first defendant a banking institution. There is a guarantee executed by him to secure a loan advanced to the Plaintiff's company known as Mvita Beer and General distributors Limited. Furthermore that he saw a newspaper advertisement by second defendant which he has exhibited for the sale of the said property by auctioning on 30/8/2002. He objects to the proposed sale on the grounds that the principal debtor should be required to pay the loan first before the guarantor being called upon and that he has not received the Statutory Notice of Sale and furthermore he has not received 45 days notice from the auctioneer under the Auctioneers Act. A photocopy of Certificate of Title headed:

“Registration of Titles Certificate of Title L.R. 3424” in which there are several entries No.28 of which records “charge to National Bank of Kenya and entry No. 29 records variation of charge to the National Bank of Kenya Ltd.” Document of charge and further charge are not exhibited. In opposition the defendants represented by Mr. Songoro has filed the replying affidavit and grounds of opposition. He did not pursue his grounds Number 2. However on the other grounds he submitted that as the orders sought are for the period before the hearing of this application orders to last until the full hearing of the case cannot be granted as none is asked for in the application. Further he submitted that remedy for Applicant was in damages and not in equity of injunction.

In the replying affidavit the Defendants exhibited several correspondence but nowhere do they show that a statutory Notice has been issued. Again no charge document was exhibited. The court is left to speculate on the terms of the charge and agreement of guarantee if any between the parties. In his submission counsel for applicant asserted that statutory notice under section 74 Registered Land Act Cap 300 is not complied with and therefore the right of charge to sell has not accrued. The replying affidavit also refers to the charge as registered under Registered Land Act. There is no material land before me to show under which regulation the charge is made. The title being registered under the Registration of titles as indicated in the Plaintiff's exhibit PDMI the court cannot presume that the charge is under any one of the two statutes.

I find that there is no sufficient material laid before the court to warrant an injunction being issued. The application is dismissed with costs.

The ex parte order granted is hereby discharged.

Dated this 18th day of December, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Mr. Sangoro for Respondent

N/A for Kabuki